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AMERICAN POLITICAL  
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## TABLE OF CONTENTS

<b>CONSTITUTION.....</b>	<b>3</b>
<b>OFFICERS OF THE ASSOCIATION.....</b>	<b>5</b>
<b>LIST OF MEMBERS.....</b>	<b>7</b>
<b>REPORTS OF THE SECRETARY AND TREASURER.....</b>	<b>21</b>
<b>PRESIDENTIAL ADDRESS.....</b>	<b>27</b>
<b>Latin American Republics:</b>	
1. Some Fundamental Misconceptions Concerning South America. By Prof. L. S. Rowe, University of Pennsylvania.....	28
2. Latin America of Today and its Relations with the United States. By Hon. John Barrett, Director of the International Bureau of American Republics.....	34
3. The Possibilities of South American History and Politics as a Field of Research. By Dr. Hiram Bingham, Lecturer at Yale University ...	46
<b>Colonial Government:</b>	
1. Some Merits and Defects of the French Colonial System. By Prof. William Bennett Munro, Harvard University.....	48
2. An Intercolonial Preferential Experiment. By Prof. C. D. Allin, University of Minnesota.....	57
<b>The Making and Revision of Law:</b>	
1. The Problem of Intelligent Legislation. By Prof. Ernst Freund, University of Chicago.....	69
2. Remedies for Legislative Conditions. By Dr. Charles McCarthy, Legislative Librarian of Wisconsin.....	80
3. Discussion of Dr. McCarthy's Paper. By Mr. Clarence B. Lester, Legislative Librarian of Indiana.....	103
4. Intelligent Legislation. By Frank M. Hoyt, Milwaukee, Wis.....	104
5. The Problem of Statutory Revision. By Mr. John Bell Sanborn, Madison, Wis.....	113
6. The Improvement and Revision of Statute Law. By Prof. E. A. Gilmore, University of Wisconsin Law School.....	128
7. The Revision of Statute Law. By M. S. Dudgeon, Madison, Wis...	132
8. The Revision of Statute Law. By Hon. Herman L. Ekern, Speaker of the Wisconsin Assembly.....	135
9. Report of Committee on Comparative Legislation. By Prof. J. W. Jenks, Cornell University.....	138
<b>The Newer Institutional Forms of Democracy:</b>	
1. Recent Institutional Legislation. By Prof. J. Allen Smith, University of Washington.....	141

## TABLE OF CONTENTS

2. Massachusetts Public Opinion Bills. By Prof. George H. Haynes, Worcester Polytechnic Institute.....	152
3. Primary vs. Representative Government. By Prof. J. W. Garner, University of Illinois.....	164
4. The Influence of the Primary Election upon Party Organization. By Prof. Jesse Macy, Iowa College.....	175
5. Some Disputed Points in Primary Elections. By Prof. Charles Edward Merriam, University of Chicago.....	179
6. The Des Moines Plan of City Government. By Prof. Benjamin F. Shambaugh, State University of Iowa.....	189
7. Results of the Initiative and Referendum in Oregon. By Mr. W. S. U'Ren, Oregon City.....	193
8. The Initiative and Referendum in Oregon. By Mr. George A. Thacher, Portland, Oregon.....	198

**The Administration of Punitive Justice:**

1. Inherent and Acquired Difficulties in the Administration of Punitive Justice. By Prof. Roscoe Pound, Northwestern University.....	222
2. Problems of Trial by Jury. By Judge James E. Babb, Lewiston, Idaho	240
3. Proposed Reforms in Criminal Procedure. By Justice Horace E. Deemer, Supreme Court of Iowa.....	246
4. Legal Obstacles to the Reform of Prisoners. By Hon. S. J. Barrows, President of the International Prison Commission.....	260
5. The Legal Repression of Political Corruption. By Mr. Frank E. McGovern, District Attorney, Milwaukee, Wis.....	266
6. Problems of Criminal Judicature in Chicago and How They Have Been Met by the Municipal Court. By Mr. Robert H. McCormick, Jr., Chicago, Ill.....	277
7. A Comparative View of Criminal Procedure. A Note. By Prof. Rudolf Leonhard, University of Breslau.....	285

**Public Service Commissions:**

1. The Public Service Commissions Law of New York. By Hon. Thos. M. Osborne, Member of the New York State Public Service Commis- sion.....	287
2. The Public Service Commission Law of Wisconsin. By Hon. William H. Hatton, Ex-State Senator, New London, Wis.....	305
3. The Public Service Commission Law of Wisconsin. By Hon. George B. Hudnall, State Senator, Superior, Wis .....	316
4. Public Service Commissions. Remarks upon the Papers of Senator Hatton and Mr. Osborne. By Prof. John H. Gray, University of Minnesota.....	324

## **CONSTITUTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION**

### **ARTICLE I—NAME**

This Association shall be known as **THE AMERICAN POLITICAL SCIENCE ASSOCIATION.**

### **ARTICLE II—OBJECT**

The encouragement of the scientific study of politics, public law, administration and diplomacy.

The Association as such will not assume a partisan position upon any question of practical politics, nor commit its members to any position thereupon.

### **ARTICLE III—MEMBERSHIP**

Any person may become a member of this Association upon payment of three dollars, and after the first year may continue such by paying an annual fee of three dollars. By a single payment of fifty dollars any person may become a life member, exempt from annual dues.

Honorary life members, exempt from the payment of dues, may be elected by the Association, but no more than two such members may be elected during any one year [adopted December 30, 1907].

Each member will be entitled to a copy of all the publications of the Association issued during his or her membership.

### **ARTICLE IV—OFFICERS**

The officers of this Association shall consist of a President, three Vice-Presidents, a Secretary and a Treasurer, who shall be elected annually, and of an Executive Council consisting ex officio of the officers above mentioned and ten elected members, whose term of office shall be two years, except that of those selected at the first election, five shall serve for but one year.

All officers shall be nominated by a Nomination Committee composed of five members appointed by the Executive Council, except that the officers for the first year shall be nominated by a committee of three to be appointed by the chairman of the meeting at which this Constitution is adopted.

All officers shall be elected by a majority vote of the members of the Association present at the meeting at which the elections are had.

### **ARTICLE V—DUTIES OF OFFICERS**

The President of the Association shall preside at all meetings of the Association and of the Executive Council, and shall perform such other duties as the Executive Council may assign to him. In his absence his duties shall devolve successively

upon the Vice-Presidents in the order of their election, upon the Secretary and the Treasurer.

The Secretary shall keep the records of the Association and perform such other duties as the Executive Council may assign to him.

The Treasurer shall receive and have the custody of the funds of the Association, subject to the rules of the Executive Council.

The Executive Council shall have charge of the general interests of the Association, shall call regular and special meetings of the Association, appropriate money, appoint committees and their chairmen, with appropriate powers, and in general possess the governing power in the Association, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation or failure to elect, such appointees to hold office until the next annual election of officers.

Five members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

Ten members shall constitute a quorum of the Association and a majority vote of those members in attendance shall control its decisions.

#### ARTICLE VI—RESOLUTIONS

All resolutions to which an objection shall be made shall be referred to the Executive Council for its approval before submission to the vote of the Association.

#### ARTICLE VII—AMENDMENTS

Amendments to this Constitution shall be proposed by the Executive Council and adopted by a majority vote of the members present at any regular or special meeting of the Association.

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REPORT OF THE PROCEEDINGS  
of the  
FOURTH ANNUAL MEETING  
of the  
American Political Science Association

By the Secretary

The Fourth Annual Meeting of the Association was held at Madison, Wisconsin, December 27-31, 1907. At the same time and place annual meetings were held of the American Historical Association, the American Economic Association, The American Sociological Society, the American Association for Labor Legislation, and the Mississippi State Historical Society. The entertainment of the members of the Associations was undertaken by the Social Sciences Club of the University of Wisconsin and the Wisconsin State Historical Society, and was bountiful to an extreme. Besides many dinners and luncheons at the houses of individual professors of the University, to which groups of members were invited, there was a buffet luncheon Saturday, December 28, and a "smoker," Monday evening, December 30, to which all the members of all the Associations were invited.

The Secretary of the Association reported a gratifying increase in the membership, the enrollment during the year having risen from about three hundred and forty to a little over six hundred. So expensive, however, is the publication of the *REVIEW*, the Association is not yet self-supporting. It is hoped, however, that the membership will continue to increase at the same rate during the current year. Present members of the Association are earnestly urged to send to the Secretary the names of those of their associates or acquaintances who it is thought may be interested in the work and publications of the Association, in order that he may communicate with them by letter, circular or specimen copy of the *REVIEW*. Experience has shown that it is almost wholly in this personal manner that new members have been obtained.

At the business meeting it was voted to hold the Fifth Annual Meeting in Richmond, Virginia, though the Executive Council has been authorized, at its discretion, to hold one session in Washington, D. C.

The Association is to be congratulated upon having received the consent of Right Honorable James Bryce, British Ambassador to the United States to accept the Honorary Presidency of the Association for the year 1908, a position to which he was unanimously elected by the Association. Prof. Albert Bushnell Hart of Harvard University was elected First Vice-President; Prof. H. A. Garfield, President-elect of Williams College, Second Vice-President; Prof. Paul S. Reinsch, of the University of Wisconsin, Third Vice-President, and Prof. W. W. Willoughby, of the Johns Hopkins University, Secretary and Treasurer. Prof. B. F. Shambaugh, Prof. J. A. Fairlie, and President H. P. Judson retired from the Executive Council, and their places were filled by the election of Prof. Isidor Loeb, of the University of Missouri, Prof. J. W. Jenks of Cornell University, and Prof. C. E. Merriam of the University of Chicago. Prof. J. W. Garner, of the University of Illinois was selected as a member of the Board of Editors of the REVIEW to fill the vacancy occasioned by the resignation of Dr. Robert H. Whitten.

The following amendment to the Constitution, to be inserted between the first and second paragraphs of Article III, was adopted:

Honorary life members, exempt from the payment of dues, may be elected by the Association, but no more than two such members may be elected during any one year.

Right Honorable James Bryce, and Sir Wilfred Laurier<sup>1</sup> were elected honorary members.

#### MEETINGS OF THE EXECUTIVE COUNCIL

At a meeting held, November 30, 1907, at the City Club, New York City, the following members were present: F. N. Judson, A. B. Hart, W. W. Willoughby, Albert Shaw, James T. Young, J. A. Fairlie and J. H. Latané.

The management of the REVIEW was the chief subject of discussion. It was voted that but three numbers of the REVIEW be issued during the year 1908, and that the November, 1908, issue be counted as the fourth number of volume two, so that, beginning with the year 1909, the volumes of the REVIEW will correspond with calendar years.

<sup>1</sup> Declined election.

It was voted that the size of the annual volume of Proceedings be reduced, when possible, by printing the papers read at the annual meetings in abstract instead of complete form.

Dr. Willoughby was appointed to confer regarding common interests with representatives of the American Historical Association, the American Economic Association and the American Sociological Society.

The Secretary was directed to communicate to the Trustees of the Carnegie Institution the recommendation of the Executive Council that, when circumstances permit, there be established in the Carnegie Institution a Department which shall do for the scientific study of matters political a work corresponding to that now being done for history by the Department of Historical Research.

The council recommended that at the next meeting of the Association the Constitution of the Association be amended so as to provide for honorary members exempt from the payment of dues, but that no more than two such members shall be appointed each year.

The Secretary was instructed to communicate with the managers of the Sage Foundation with a view to inducing them to undertake, or to assist the Association in undertaking a comprehensive investigation of police protection and the administration of criminal law in the United States.

At a meeting held in Madison, Wisconsin, December 29, 1907, to which the members of the Board of Editors of the REVIEW were also invited, the following were present: F. N. Judson, P. S. Reinsch, J. A. Fairlie, J. H. Latañé, B. F. Shambaugh, J. W. Garner, C. E. Merriam and W. W. Willoughby.

A communication from Dr. L. S. Rowe, of the University of Pennsylvania, was read, moving that a special committee of the American Political Science Association be appointed for the encouragement of the study of Latin-American institutions in American universities, and that for this purpose such committee be authorized to enter into correspondence with those who are offering courses in political science with a view to effecting this purpose; that the committee be further requested to prepare an outline of such course and to furnish such other references and material as may be required, and that an appropriation, not to exceed fifty dollars (\$50), be made to cover postage and such stenographic aid as may be necessary. It was voted that Profs. L. S. Rowe, P. S. Reinsch, and Mr. Hiram Bingham be appointed to ascertain what courses on Latin-American political institutions

are now being given in American Universities, and to report at the next annual meeting of the Association. It was not felt that an appropriation for expenses was warranted.

Profs. P. S. Reinsch and W. W. Willoughby were appointed a committee, with power to add to their number, to prepare a memorial to the Carnegie Institution at Washington, D. C., urging the creation of a Department of Political Science Research.

The committee on the proposed investigation of police administration reported that, because of lack of funds, no progress had been made.

The committee on instruction in American government in secondary schools was continued with power to add additional members.

Profs. J. H. Latané and W. W. Willoughby were appointed a committee, with power to add to their number, on the program of the Fifth Annual Meeting.

## REPORT OF THE TREASURER FOR THE YEAR 1907

### RECEIPTS

Fees, life membership.....	\$250.00
Annual dues.....	1637.00
Publications sold.....	154.76
Subscriptions to the REVIEW.....	97.75
Interest on bank deposit.....	48.49
 Total receipts to December 30, 1907.....	\$2188.00
Balance on hand December 29, 1906.....	1668.11
 <b>\$3856.11</b>	

### EXPENDITURES

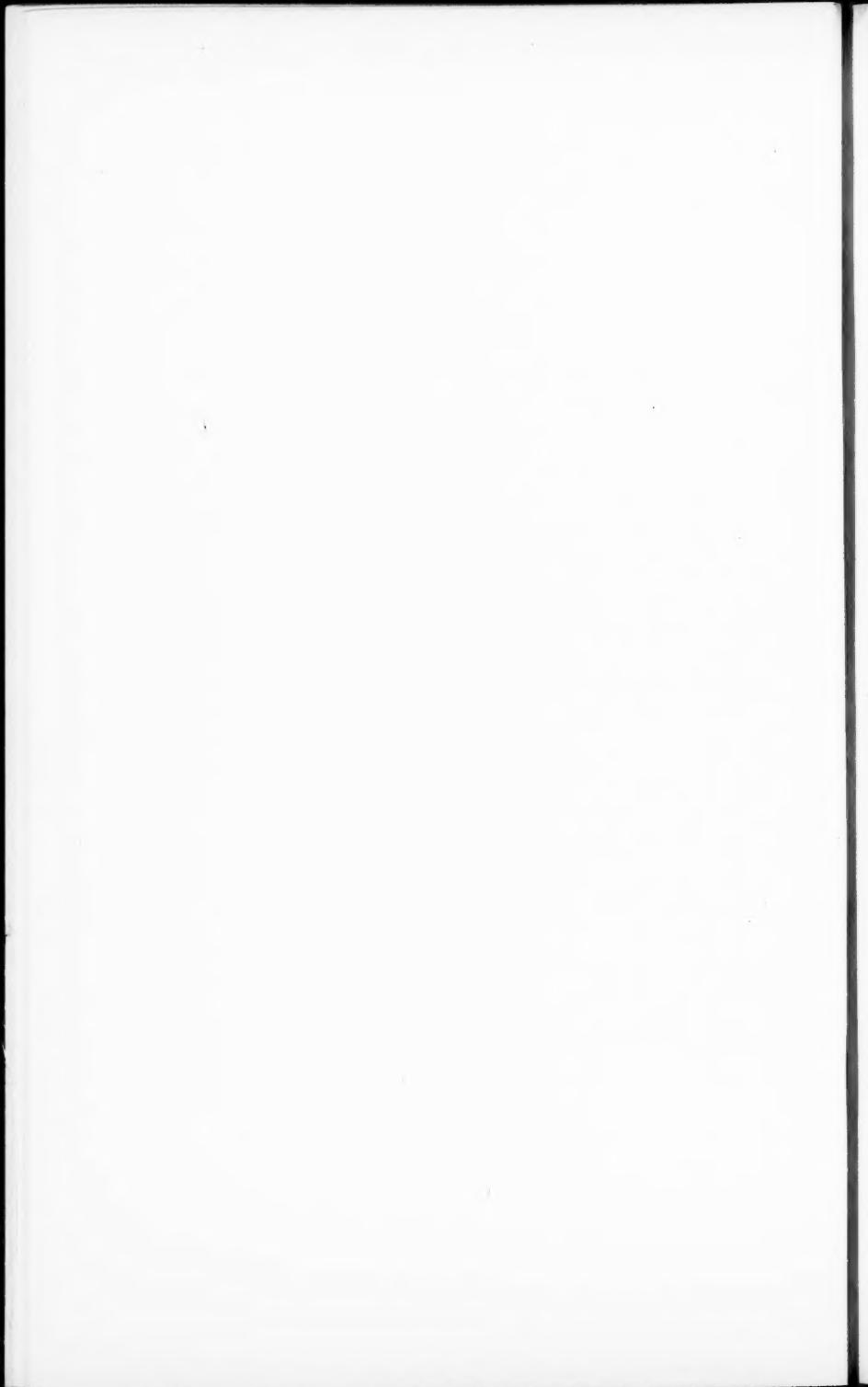
Printing REVIEW.....	\$2226.73
Printing Volume III Proceedings.....	520.84
Preparing "copy" for REVIEW (Legislative Notes, News and Notes, Lists of Government Publications).....	312.70
Postage, expressage.....	239.77
Clerical assistance.....	253.05
Miscellaneous printing and stationary.....	145.98
Binding Proceedings.....	16.00
Committee on Instruction in Political Science.....	25.00
 Total expenditures.....	\$3740.09
Balance on hand, December 30, 1907.....	116.02

Submitted December 30, 1907.

W. W. WILLOUGHBY.

Audited and found correct:

J. A. FAIRLIE,  
C. E. MERRIAM.



## PAPERS AND DISCUSSIONS

### PRESIDENTIAL ADDRESS: THE FUTURE OF REPRESENTATIVE GOVERNMENT

By HON. F. N. JUDSON

*St. Louis, Missouri*

In this address which is published in full in the February, 1908, issue of the AMERICAN POLITICAL SCIENCE REVIEW, Mr. Judson considered the growing popular distrust in this country of representative government as manifested in the numerous modifications in it proposed by political writers and in part adopted by legislatures and constitutional conventions. In the federal government direct popular election of the president was early substituted for indirect election, while at present the movement is strong to obtain the popular election of senators. In the States, increasing constitutional limitations have been and are being laid upon the powers of the legislatures. Special legislation is forbidden, the taxing and borrowing powers are restrained, the form of law and the procedure of legislation prescribed, legislative sessions lessened in number and duration, and the referendum and initiative demanded. With reference to the referendum, the speakers declared that

experience does not warrant us in concluding that the ideal representative government can be restored by the substitution of the average public opinion for the deliberate representative judgment, in the initiation or decision of the details of legislation. \* \* \* The referendum may have its place in our political system as an *in terrorem* preventive, or even a corrective, but it cannot be a panacea for our legislative evils.

Mr. Judson also dealt with the regulation of the lobby, the State regulation of party organization, the expense of office seeking, the decrease of elective offices as a means of political reform, and proportional representation.

## SOME FUNDAMENTAL MISCONCEPTIONS CONCERNING SOUTH AMERICA

BY PROF. L. S. ROWE

*University of Pennsylvania*

The awakening interest in South American affairs has served to make prominent the confusion of the public mind on certain fundamental questions relating to the present situation and the probable future of political and social institutions in this quarter of the globe. This confusion is due, in large part, to the widely divergent opinions of writers on South America. At first this conflict of views was received with a certain amused indifference, it being assumed that this unknown land, so rich in adventure, was rapidly becoming the theatre of the modern romantic novel, displacing to a certain extent the battlements and towers of mediæval Europe. During the last few years, however, the attitude of the public toward South America has undergone a profound change. We are no longer satisfied with the swashbuckler descriptions of revolutions and other armed conflicts but are demanding unvarnished statements of the actual situation. There is a real national interest that this demand be satisfied, for it is evident that the time is rapidly approaching, if indeed it is not already at hand, when the people of the United States must be prepared to express themselves clearly and unequivocally on certain fundamental questions affecting their relation with the peoples of Latin America.

We must, first of all, abandon all hope of studying South America *en bloc*. There are, of course, certain common traits due to community of racial origin, social tradition and political antecedents. But as soon as we get beyond these fundamental traits it becomes necessary to distinguish carefully between the conditions of economic and social growth through which each of these republics has passed. Each country developed under economic and social conditions peculiar to itself. Today the countries of South America when compared with one another present differences quite as marked as those which dis-

tinguish the countries of Europe from one another. In Brazil we find a federal republic, loosely knit together, but with an administrative organization sufficiently developed to assure stability and security of person and property. The Argentine offers the spectacle of an organized democracy, which has passed through a peaceable social revolution and in which the political system is gradually adapting itself to the new social conditions. Chile is still in many respects a political aristocracy, which is entering upon the first stages of a social revolution through the gradual awakening of the laboring classes to consciousness of power.

In order to understand these countries we must begin with a study of social organization. The first and most serious mistake into which we have fallen has been in judging their national life by the play of party politics. The constant shifting of governmental policy, due to the ephemeral character of party combinations, has created an impression of instability which a more careful analysis of the situation fails to justify. In all the countries of South America there exists a wide gap between the political life of the nation on the one hand, and its economic, industrial, and social activities on the other.

It would be difficult to imagine a more rapid shifting of governmental policy than is taking place in Chile. Under the parliamentary system, for the maintenance of which the civil war of 1891 was fought, the ministries succeed one another with almost bewildering rapidity. It was even rumored in Santiago that the German government had instructed its diplomatic representative not to report cabinet changes until the new ministry had been in office at least one week. And yet this instability of political life affects the life of the nation to a very limited degree. The great mass of the business community look upon politics as the game of a small group of professionals, a necessary evil, tolerable so long as it does not become too serious an obstacle to progress. Politics is looked upon as a career, which one must either enter as a profession or remain entirely aloof. The idea of civic effort with no end in view other than the public welfare is gradually breaking ground but it has as yet exerted but little influence upon political life. In Chile, as in the Argentine and Brazil, a small group of young men are beginning to sound a new note—that of the civic obligation of every citizen—an idea new to the political life of South America.

It is important in interpreting South American conditions to distinguish between two forms of political instability. There is, on the one hand, the type of political instability which finds expres-

sion in perpetual revolution, constituting a constant menace to life and property and an insuperable obstacle to industrial progress. We need not go far to find classic instances. The long series of revolutions in some of the Central American states is fresh in the mind of every student of Latin-American history.

There is, on the other hand, a form of political instability which expresses itself in a constant shifting of political power between different parties or combinations of parties, but which does not affect the fundamental basis of social order. This is the form of instability which exists in Chile and to a certain extent in the Argentine Republic. Ministries succeed one another every few months but the industrial and social life of the nation follows its normal course unaffected by these changes. It is largely through the confusion of these two types of political instability that we are led to misinterpret the actual situation in the more advanced countries of South America. In spite of all the disadvantages of political instability a careful study of other phases of national life in South America leads one to the conclusion that there exist in the social and economic constitution of these countries elements of stability which far outweigh in importance the apparent instability of political conditions and which offer the best guaranties for the maintenance of order and protection to person and property.

There is probably no other section of the world in which the family organization rests on so solid a basis. It is true that the unmarried woman enjoys relatively little freedom in these countries, and it is equally true that the legal rights of the married women are far more restricted than in the United States. The social status of the unmarried and the limited legal rights of the married woman are apt to mislead the foreigner unless he undertakes a careful study of the family itself. He will there find a strength of organization and a solidity of structure which cannot be found either in the United States or in any European country. The unity of family feeling extends not only through the direct line of descent but to all the collateral branches. It is within this large family group that the spirit of co-operation finds its most distinct expression, and it is this spirit of mutual helpfulness within the family group which lends stability to the social organization of the South American countries. Divorce is unknown in the South American codes, but even were it recognized it would be most sparingly used. The public opinion of these countries is so unalterably opposed to the dissolution of the marriage tie that social ostrac-

cism would confront those who attempted to avail themselves of this remedy.

It must not be supposed, furthermore, that the legal subordination of the wife means either the elimination or diminution of her influence. Throughout South America the rearing and education of the children are left to the mother to a far greater extent than in Europe or in the United States. In marked contrast with conditions in the United States there is a lack of companionship between father and children. This gives to the mother a predominant influence in the internal affairs of the family. In fact on her judgment depend the education of the children and to a very large degree the callings which they are to follow.

Another error into which we are apt to fall in our interpretation of South American conditions is in taking the violent play of party politics as an indication of the absence of real patriotism. Because political differences are largely personal differences there is a general tendency on the part of foreign observers to sum up the situation with the remark so often quoted, "No one cares for anything but his personal interests."

The fundamental error of this interpretation consists in making universal the point of view of a comparatively small group of politicians. Throughout South America the mass of the people are as devoted to their respective countries as in any portion of Europe. They are as conscious of the sacrifices that have been made to secure their present position of independence and are as determined to allow no outside interference with the normal development of their native or adopted land. It is this fact which makes so objectionable the theories of European and American scientists as to the desirability of "placing turbulent South America under the domination of races who have demonstrated their aptitude for self-government." Propositions of this kind are extremely attractive to the northern mind. They are clothed in scientific language and have all the appearance of careful scientific deduction. The real reason for their widespread acceptance, however, is to be found in the fact that they flatter that complacent sense of national and racial superiority which is so deeply imbedded in the American mind and which is largely responsible for the feeling of distrust which still exists in certain sections of Latin America.

The history of South America abounds with deeds of heroism and self-sacrifice, the memory of which has been a constant spur to national

pride and patriotism. To think that these countries have little regard for their past or for their future is fundamentally to misconstrue the temper of the people. The strength of national feeling and the consciousness of national purpose are becoming more definitely marked with each decade. The invitation to attend the second peace conference at The Hague was but the formal recognition of an accomplished fact—the establishment of a group of sovereign and independent states in the southern hemisphere, whose political importance could no longer be ignored. We, in the United States, are but beginning to realize that these nations are no longer the object of our descending sympathy. For the most part, they are full-fledged states, ready to assume their share of the world's work and destined to exert a powerful influence upon world polities. To our government their coöperation and support will be invaluable in raising the plane of international relations and in maintaining the higher interests of international peace. This phase of the situation we have hitherto ignored, taking it for granted that while we might be of service to the countries of South America we could not expect anything in the nature of a counter-service.

To this series of misrepresentations of South American conditions we may add the opinion so generally expressed by all writers, that individual initiative and enterprise are totally lacking; the government being expected not only to perform its usual functions but also to assist individuals in undertakings of a purely private character. It is true that this tendency, inherited from Spain, strongly impresses the foreign observer and it requires some time to detect the changes that are taking place. Upon the younger generation, the example of the United States is exerting a marked influence. In Brazil, in the Argentine, and especially in Chile, the influence of the new spirit is most marked not only in commercial life but also in civic and philanthropic effort. The improvement of the educational system, the closer commercial and intellectual contact with the United States and the example of the large foreign element in their midst, have all contributed toward fostering the new movement. Unless the signs of the time are fundamentally misleading we may confidently look forward to the gradual disappearance of the old Spanish tradition of paternalism and to the inauguration of a period of individual initiative and enterprise which will set at rest all doubts as to the capacity of the people of Latin America to avail themselves of the rich and varied resources with which this section of the American continent has been endowed.

The views of the people of the United States with reference to South America have been formed in part from newspaper reports, which have until recently been devoted almost exclusively to the details of revolutionary movements, and in part from the highly colored accounts of writers in search of adventure or fascinated by the picturesque. We are now entering upon the transition from fiction or half-truth to reality, a change which will not only give us a clearer appreciation of South American conditions but will also pave the way for a closer understanding between the republics of this continent.

## LATIN AMERICA OF TODAY AND ITS RELATIONS WITH THE UNITED STATES

BY HON. JOHN BARRETT

*Director of the International Bureau of American Republics*

Within a comparatively few years the United States has become a world power in the broadest sense of that descriptive term. Coördinately with our wonderful internal development have grown our influence and commerce with foreign nations. Although we have been and are overwhelmingly absorbed with the solution of great and grave internal national problems, we have confronted, and are facing, problems of equal importance in our dealings with other nations. We can make no greater error in shaping our present policies with reference to their effect on the future than to disregard the obligations and responsibilities which rest upon us as the most powerful and populous republic of the western hemisphere. When we study, moreover, the various phases of our foreign affairs we find the most interesting and perhaps the most important field of our friendly and commercial influence to be that of the twenty republics to the south of us.

It is, therefore, worthy of careful consideration that a critical situation is impending in the relations of the United States with Latin America. Not critical in the sense that any serious diplomatic difference is about to develop. Critical, rather, in the sense that, if the United States does not give more heed to the progress and importance of Latin America, it will soon be so far distanced by Europe in the race for the control of commerce and for the exercise of moral influence that it will never attain the position of leadership which it should hold among its sister republics. The people of the United States are so much occupied, on the one hand with their own internal questions, and, on the other with what is going on in Europe and the Far East, that they do not appreciate the wonderful advancement which is characterizing the Latin American nations. Our newspapers and magazines are full of articles about Europe and Asia, with only rarely a passing reference to South America. Telegraphic reports of great

political and international events in the southern republics do not get as much attention in the metropolitan newspapers as a small social gathering in Paris or Tokio.

So much attention in fact has been given by the press and people of the United States to European and Asiatic politics and peoples that we have, as a country at large, grossly neglected our sister American nations. Notwithstanding the facts that they belong to our own community, as it were, and are joined to us by ties of historical development, of similar constitutions, of like struggles for independence and evolution of government, of corresponding aspirations and ambitions, and of physical location in the new world, we have practically treated them as if they were more remote than any section of Europe, Asia, or Africa.

On both the material and intellectual side, other nations which are much more remote from Latin America are making greater efforts to get acquainted and into closer intercourse with them. We see Japan not only establishing steamship connections with Mexico and with the countries on the west coast of South America, but getting into closer touch with Brazil and Argentina. Such European countries as England, France, Germany, Spain, Portugal, Italy, and Austria, are establishing the closest transportation relations, and their merchants are doing all in their power to get a good footing in this field. Correspondingly we see the most eminent scholars, authors, scientists, historians, and specialists of European countries frequently visiting Latin America, and, in turn, we observe the same classes of people in Latin America spending most of their time of study and travel in Europe. It is no exaggeration to state that five-sixths of all South Americans, who go abroad, visit Europe rather than this country.

This tendency would have brought us to a disastrous parting of the ways if it had not been for the broad statesmanship of President Roosevelt and Secretary Root which recognized the necessity of the United States, getting into closer sympathy with her neighbors, demonstrating sincere interest in their progress and development, and removing distrust as to her attitude toward them in connection with the Monroe Doctrine and in her treatment of their rights and peculiar characteristics.

The two remarkable diplomatic visits of Secretary Root to South America and Mexico accomplished more for the growth of North American prestige, influence, and trade than all the diplomatic

correspondence of a hundred years. Secretary Root appreciated the Latin American peoples and approached them with sympathetic manner and speech and endeavored to give them a new view of the ambitions and intentions of the United States toward her sister nations. Unless, then, the people of the United States take advantage of what Mr. Root accomplished they will have only themselves to blame when they find that, in the competition of nations, they have become laggards instead of leaders in the evolution of the idea of Pan-American unity and coöperation.

The value of Secretary Root's mission to South America and Mexico has not been fully understood in this country. The press of Europe and Japan devoted more space to his travels through the Latin American countries, to his speeches, and to the wonderful reception which was everywhere accorded him, than did the newspapers of his own country. European and Japanese statesmen, with their special training which makes them everywhere watch carefully the politics of foreign lands, saw with clear vision the significance and effect of this unprecedented diplomatic journey. In contrast to this, we find hardly a man in public life in the United States who has ever given the secretary due credit for what he accomplished. Considering, moreover, the cordiality and magnificence which characterized the receptions accorded the secretary of state by Latin America, it is not surprising that the leading papers and men of that portion of the world were astonished at the lack of reciprocal interest on the part of the United States.

Right here, then, in the respect just mentioned, we have evidence of a critical weakness in our efforts to make ourselves strong with our sister republics. The tendency all along of the United States and its newspapers, in speeches of its public men, and in its general discussions has been to treat the Latin American nations, peoples, and affairs with an air of patronage; with a "holier than thou" attitude, and with a suggestion of superiority. We have, in other words, failed to appreciate their great historical achievements, their remarkable industrial development, the growth of their cities, the excellence of their institutions, the value of their trade, and the strategic importance of their countries in the future of international relations. Too much emphasis has always been placed upon the idea that Latin America is characterized by revolutions, and there has been forgetfulness of the fact that five-sixths of Latin America's area and population has known no serious revolutions for nearly two decades.

Secretary Root made a mighty effort to undo the harm of the past and to awaken the confidence and sympathy of the Latin American republics. He invariably manifested such evident sincerity and respect for their institutions that today he is undoubtedly the best loved man in all the western hemisphere. His name is a family word from the Gulf of Mexico to the Straits of Magellan, and it now behooves the government of the United States and the people of this country to take advantage in every way possible of the new relationship which he has inaugurated. Today, all Latin America is watching us as never before to see whether we will profit by the results of the visit of the secretary and foster, with ties that cannot be broken, the union in spirit, interest, and purpose of the American nations.

A few weeks ago there were concluded in Washington the sessions of one of the most important international gatherings which have ever assembled in the western hemisphere, if not in all the world. The Central American peace conference, which has been meeting during the past November and December in the International Bureau of American Republics, adjourned after taking one of the most progressive steps towards absolute arbitration of disputes of nations which has been recorded in history. The five republics of Costa Rica, Nicaragua, Guatemala, Salvador and Honduras, with the coöperation of the United States and Mexico, drew up and signed a treaty of arbitration which covers all disputes. There is no hedging on the point of so-called national honor, and a supreme court of justice is created from which there can be no appeal to arms. In this way, a group of nations which have been frequently characterized as revolutionary and unstable but possessing vast potentialities of wealth and development, has set an example to the larger and more powerful countries which cannot fail to attract wide attention and discussion throughout the world. While doubt may be expressed by skeptics of the binding nature of this treaty, it certainly is a long step in the right direction. That the delegates of these different republics intended that the treaty should be no idle collection of words is evidenced by article xxiv which says:

The judgment of the court shall be communicated to the five governments of the contracting republics. The interested parties solemnly bind themselves to submit to said judgment; and they all agree to lend every moral support that may be necessary in order that it may be properly fulfilled, in this manner constituting a

real and positive guarantee of respect for this convention and for the Central American court of justice.

In reviewing the action of the Central American peace conference, it is worthy of note and significant that all of the delegates admitted that Secretary Root's interest in Latin America and the powerful coöperation of the Mexican government, given through Ambassador Creel, were responsible not only for the meeting of the conference in Washington but for its successful conclusion.

A great factor unfavorable to North American trade and influence in Latin America is the essential difference in lineage and language, but this point is little appreciated. The power of similarity in race and tongue is mighty. Kinship in these respects brings men closer together. It makes them more sympathetic, and this counts much in Latin countries. The average North American, instead of carefully studying methods of counterbalancing these conditions adverse to his progress in Latin America and of adapting himself thereto, undertakes an independent line of action and ultimately fails in his purpose.

As to language, it is difficult to speak with patience. So small is the percentage of North Americans visiting Latin America, on business or pleasure, who speak Spanish, Portuguese, or French, that it is a wonder that they make any progress in their plans. Ninety-five per cent of the Europeans who go to Central and South America understand one of these tongues. French is mentioned because nearly all the well educated Latin Americans speak that language. This subject requires no argument, it is simply impossible for the North American, who knows none of these languages, to become thoroughly "*simpatico*," and to master the Latin point of view in either commercial or political relations. I would that both our business schools and regular colleges might make the study of either Spanish, French, or Portuguese compulsory in order to receive a diploma. Portuguese is more important than is generally regarded because it is the working language of Brazil, and Brazil today is taking rank as one of the great nations of the world. But the average well-to-do Brazilian also speaks French.

Our ignorance of Latin America is another discouraging feature. How few North Americans realize that Latin American history during the last four centuries is replete with incident and event, names, and results that compare creditably with those of the United States, Europe, and Asia. How few know the names of the great heroes, statesmen, writers, and scholars who have figured prominently in

evolving the Latin America of today. How few are aware that the principal countries and capitals of Latin America have groups of eminent scholars, scientists and philosophers, as well as universities and professional schools, which are no less advanced than similar groups and institutions in the United States and Europe. How few North Americans, moreover, of high position in public life, in literary, scholastic, and scientific circles, visit Latin America and exchange courtesies with their fellow statesmen and students, as they do with those of Europe. No greater blessing to Pan-American accord could now be bestowed than through an exchange of actual visits and views by leaders of Pan-American thought and action. Latin America is too much accustomed to seeing and meeting only those North Americans who are intent on making money, or on securing this or that concession; thinking meanwhile only of selfish material considerations and a speedy return, with pockets filled, to the United States.

A change, a renaissance in higher class association, acquaintance and friendship, will not only start an era of sympathy and better appreciation but indirectly prove of extraordinary advantage to commerce and trade. European countries long ago realized the distinct advantage of such intercourse with, and knowledge of, Latin America and have improved every opportunity to promote more intimate acquaintance.

In studying the causes that act as deterrents to Pan-American accord, we must emphasize the lack of first-class passenger and mail steamship service, such as characterizes the systems of communication between Europe and Latin America. The long established and well defined association of Latin Americans with Europe has been immeasurably encouraged by the excellence of steamship facilities; these have given them ready access to the satisfactory conditions found there, in turn, for business transactions, education of families, and enjoyment of leisure and travel. If the average merchant and traveler of South America could reach New York with the same comfort and speed with which he can proceed to Paris, there would be at once a vast and radical change in the situation favorable to the United States.

This statement is not introduced as an argument for a "subsidized merchant marine." The writer is not discussing the *pros* and *cons* of that mooted issue. He is simply stating a fact and describing a condition.

No Latin American merchant or capitalist is going to North America on a slow semi-cargo boat with limited accommodations when there are numerous fast steamers bound for Europe with as fine arrangements as our transatlantic liners. This is axiomatic, but it means the loss of millions of dollars of trade to the United States every year according to the direct testimony of South Americans themselves. It is true that there are excellent freight steamship facilities between North and South American ports but they do not meet the passenger requirements any more than would a purely railway freight service suit the passenger traffic between New York and Chicago.

It is a surprising but significant fact that during the past year more representative Brazilians sailed from Rio Janeiro on fast mail steamers to the ports of England, France, Germany, Spain, etc., in one week than came to the United States in the whole year. This fact is accentuated by another, namely, that more representative Argentinos sailed for Europe from Buenos Aires on one steamer than came to the United States in the entire year. There is not one first-class, fast, passenger, mail, and express steamer running between New York City and Buenos Aires, while there are a dozen such ships running from that great city of over a million population to Europe. I repeat that I am not arguing in the least for a "subsidy," but I do hold that our government should be willing to pay such a compensation to steamship companies for transporting the mails that they would be able to put on the right kind of boats. We do not call it a "subsidy" when we pay for fast railroad trains to carry our mails. It would not be a "subsidy" in this instance and it would enable us to have the same class of service on the high seas that we have on land, for establishing better mail and business connections with Latin America. Last year we gave several million dollars to companies running by the way of Europe for carrying our mails to South America. Why should we not use this for steamers running directly there? This is not a "subsidy" but a wage which would enable a company to put on and maintain vessels running from sixteen to eighteen knots. This would end the present overwhelming handicap to exchange of commerce between the United States and South America caused by the fact that mails—the strong right arm of trade—come and go between Europe and South America in nearly half the time taken between the United States and South America.

As suggested before, too much importance is now attached in the United States to the idea that revolutions prevail all over Latin

America and that, therefore, commerce and investments are insecure. This conception of Latin America as a whole is entirely erroneous and does our progressive sister republics a great injustice. The continent of South America today is free from serious insurrectionary movements, with few, if any, indications of more civil wars. The recent conflict in Central America served to emphasize the firm peace and prosperity of Mexico and paved the way for the Central American peace conference already described. The tendency of public opinion and the powerful influence of large business interests in such great nations as Mexico, Brazil, Argentina, Chile and Peru are all against revolutionary movements, and, although now and then some slight sporadic uprising shows itself, it is most difficult for it to grow into dangerous proportions. Then again, the gridironing of these countries with railways permits the immediate sending of troops to any place and the crushing without delay of incipient revolts.

Before concluding, it may be fitting that I should say a few words about the International Bureau of the American Republics, which has its headquarters in Washington, D. C., and of which I have the honor to be the director or chief executive officer. It is maintained by the joint action and contributions of all the republics of the western hemisphere, for the purpose not only of promoting commerce and trade, but of developing among them better acquaintance, closer relations, and more intimate intercourse along material, educational, intellectual, and social lines.

It is an organization which has no counterpart in the world. It is not a bureau subordinate to any one department of the United States government, as many people suppose, but it is the independent office of the governments of Latin America as much as of the United States. Its control is in the hands of a governing board, made up of all the diplomatic representatives in Washington of the American republics and presided over by the secretary of state of the United States. This board, in turn, chooses the director, who is the chief administrative officer and responsible to the board for the management of the bureau.

The funds for its maintenance are provided by appropriations of the American republics made in proportion to their population, so that the smallest of the nations in area has as much interest in its support as the larger countries, like the United States. The twenty-one republics represented on the governing board are, in order of population, United States, Brazil, Mexico, Argentine Republic, Chile,

Peru, Colombia, Venezuela, Bolivia, Cuba, Haiti, Guatemala, Ecuador, Salvador, Uruguay, Paraguay, Dominican Republic, Honduras, Nicaragua, Costa Rica and Panama.

The bureau was first established in 1890 by the action of the first international conference of American republics, which assembled at that time in Washington and was presided over by James G. Blaine. The motive which prompted its establishment was the desire of the delegates to dispel the ignorance which they discovered existed in the United States about her sister republics and, in turn, among the latter concerning the United States. It was first described as a "bureau of information," and it was the intention of its founders that it should acquaint manufacturers, exporters, importers, merchants, and all classes of people seeking reliable data for the upbuilding of trade, with the kind of information that would bring about a new era in the material relations of the American republics.

Its first director was the distinguished newspaper correspondent, William E. Curtis. In a short time he gave the bureau a prominence that caused it to be recognized among all the countries as a useful and practical institution. Succeeding him until the second Pan-American conference, held in Mexico in 1901, were, in the order of their service, Clinton Furbish, Joseph P. Smith, Frederic Emory, and W. W. Rockhill, now United States minister to China. At the Mexican conference the plan and scope of the bureau was enlarged so that it should become the agency for carrying out the resolutions of this international gathering.

When Mr. Rockhill went to China in 1905, he was succeeded by Williams C. Fox, now United States minister to Ecuador. Under the various administrations of these different directors the bureau gradually grew in influence and utility, but there was lacking the direct interest and hearty support of all the governments concerned to make it as powerful and useful an institution as was desired for the good of the nations supporting it. Some new force was required to give it added influence, popularity, and practical value.

When Elihu Root became secretary of state he immediately recognized that something should be done on new and broader lines to bring about closer diplomatic, commercial, and social relations between the United States and her sister American republics. It was, therefore, decided by the administration that Mr. Root should make a tour of South America and that at the third Pan-American conference, held at Rio Janeiro in the summer of 1906, steps should

be taken to reorganize the international bureau and enlarge its scope and usefulness. In the discussions that took place in Washington, at the sessions of the governing board, prior to the Rio conference, the Latin American representatives cordially reciprocated the interest of the secretary of state in Latin America and in the plans for the bureau, with the result that, when the conference assembled, it unanimously passed resolutions that will make the bureau a powerful and practical institution for the building up of international American trade, for providing avenues of approach on political, educational, and intellectual lines, and for developing more general acquaintanceship and closer intercourse.

One of the important features of the international bureau, which is not yet fully appreciated, is the Columbus Memorial Library. It now contains over 15,000 volumes, covering a great variety of commercial, historical, and general information concerning the different American republics. It is intended to enlarge this library so that it will be the most complete collection of Americana in the world. The resolution of the second Pan-American conference, approved by the third, recommends that each government shall provide this library with copies of all its official publications. Such a collection alone would make it invaluable for consultation and reference. Today, it is being used by statesmen, writers, students, travelers, business men, and others who wish to obtain reliable information about any American country.

On New Year's day, 1907, Honorable Elihu Root, secretary of state of the United States, and chairman ex-officio of the governing board of the bureau, announced a generous gift by Mr. Andrew Carnegie of \$750,000, to be used in the construction of a new building or home for the international bureau.

The different governments supporting the bureau, including the United States, had already appropriated about \$250,000 for the purchase of a beautiful site on the corner of Seventeenth and B Streets, in the city of Washington. This location comprises five acres facing the Executive Grounds on the east and Potomac Park on the south. It is probable that the ground for this "American Temple of Peace," as Mr. Carnegie describes it, will be broken early in the spring of 1908.

Many of our sister republics are now making a progress that challenges the attention and respect of the world. Some of them are going forward with such splendid energy that they are running a close race with the past records of the United States and the present

achievements of Japan. Others are on the verge of progressive growth that will astonish sceptical critics of the Latin race and delight knowing admirers of their latent possibilities.

In short, it is safe to predict a forward movement during the next decade for the Latin American republics which will give them a position and prominence among the nations of the earth not thought possible a few years ago. It will bring to them a commerce for which the United States and Europe will compete with every resource at their command.

That I may not be deemed overenthusiastic or be too severely arraigned by pessimistic interpreters of the future, I desire most humbly to point out that all the predictions I made ten or twelve years ago, while United States minister to Siam, about the future of Japan and the general commercial development of the Far East, and which caused me to be called many unpleasant names by those who opposed my views, have more than come true in every respect. The premises on which I based these predictions, while outlined as a result of careful study and investigation, were not any more secure than those on which I base my faith in the future of Latin America.

To impress upon the minds of those who are very practical, the importance from a strictly commercial standpoint of the field being discussed, it is desirable to give some general figures covering the present extent and value of Latin American trade.

A careful estimate based on the official figures of 1904, 1905 and 1906, shows that the total foreign trade—exports and imports—of the twenty Latin American republics from Mexico and Cuba, south to Argentina and Chile, amounts now annually to the magnificent and surprising total of approximately \$2,000,000,000. The exports and imports stand about in the ratio of five to three, that is, the former represents three-fifths and the latter two-fifths of the total. Exports, therefore, can be placed at about \$1,200,000,000, and imports at \$800,000,000. Now if we went no further into this investigation, these remarkable sums alone, which show almost a phenomenal advance over those of ten years ago, would be incontrovertible arguments in favor of the United States bending its energies to increase its commerce with South America.

I admit that I seem to speak with an element of prejudice. Frankly, I like Latin America and Latin peoples. The more I see of them the more I respect them. Would that more North Americans could become better acquainted with South Americans, study more inti-

mately their impulses, ambitions, hopes, achievements, and see things from the Latin American standpoint. Otherwise expressed, it would be a signal blessing to international Pan-American accord and it would inaugurate a new era immediately in the relations of the United States with her sister American republics, if, in thinking, writing, and speaking of them, their peoples, and their polities, we could follow the old Biblical adage and remove the beam from our own eye before looking for the moat in that of the Latin American.

One of the most important effects, if not the principal result, of the sailing of the battleship fleet to the Pacific has been almost overlooked in the constant discussion of the effect on Japan, and that is the impression created in South America.

We have failed to note that the great newspapers and leading men of our sister republics are giving even more attention to the movement of this armada than are those of our Oriental neighbors.

The powerful and progressive republics of South America, like Brazil, Argentina, Chile, and Peru, which are fast becoming world powers, are not only welcoming the coming of the ships and applauding this vast and unique naval undertaking, but are planning to give the fleet a reception that will not be surpassed in cordiality, enthusiasm and extent by any reception that may be accorded them later either on our own Pacific Coast or in the ports of the Orient.

At Rio Janeiro, in Brazil, and again at Callao, in Peru, Admiral Evans' fleet will be greeted and treated as the real representative of the naval strength, as Secretary Root was the true envoy of the new diplomacy of the United States, which, politically, commercially, historically, and geographically, is the natural ally and friend of all South America.

In short, the voyage around South America of this fleet, while not in any way intended or planned to impress South American countries, and, therefore, all the more appreciated by them, will establish beyond quibble or issue one point, often discussed in South America with doubts, about the strength and capacity of the United States as compared to Europe, that, if ever the necessity should come, which God forbid, the United States could enforce and maintain its position that the Monroe Doctrine is a strong, living issue, never to be forgotten in the competition of nations for power and influence on the western hemisphere.

#### **ABSTRACT**

### **THE POSSIBILITIES OF SOUTH AMERICAN HISTORY AND POLITICS AS A FIELD FOR RESEARCH<sup>1</sup>**

BY DR. HIRAM BINGHAM

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The time has unquestionably come for us to develop not only more commerce with South America but also more intelligent relations with our southern neighbors. Most of us are much more ignorant about their history and politics than we care to admit. There is an increasing demand for trustworthy books on these subjects and the question arises as to whether it can be met. Is the field a profitable one for research, and is it possible with our available resources to undertake the production of scholarly works? It is the aim of this paper to answer these questions and to indicate the whereabouts of some of the more important collections of manuscript and printed sources, particularly those that are accessible in this country.

The basis for the paper is the author's card catalogue in the Yale Library, which includes among many others the titles of books relating to South America that are now in the Harvard Library, the Library of Congress, and the Yale Library. It is planned to make this catalogue a subject index of material relating to Spanish America. At present it contains about 25,000 cards.

It is not generally realized that South America offers a much longer period of history for study than North America and an equal variety of subjects, many of absorbing and dramatic interest both for the historian and the political scientist. The need for monographs is very great, and the accessible materials for research are abundant.

Most of the manuscript sources for the colonial period are in the Spanish archives in Seville, Simancas, and Madrid. But for the nineteenth century, the material is widely scattered. Most of it is in South America, but much is in London, and there is a large amount in Washington, in the state department, which has over 700 bound

<sup>1</sup>This paper appears in full in the monthly Bulletin of the International Bureau of American Republics.

volumes of dispatches received from South America during the nineteenth century.

Many of the larger American libraries are able to supply both printed sources and secondary works.

The Library of Congress and the Columbus Memorial Library of the Pan-American Bureau offer excellent facilities for carrying on research in Washington.

The Yale Library has a large collection, perhaps the largest in this country, of books and manuscripts relating to South America. There are about 3300 manuscripts and over 7000 volumes of printed sources, official documents, laws, codes and decrees, periodicals and newspapers, political pamphlets, and secondary works.

The Harvard Library has a good working collection, including many sets of printed sources. The University of Pennsylvania has a large collection of the public documents of Argentina, Chile, Peru and Bolivia. The Library of Cornell University is particularly well supplied with books on Brazil. And the Bar Association of New York has the codes and commentaries of all the South American republics.

## SOME MERITS AND DEFECTS OF THE FRENCH COLONIAL SYSTEM

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At the close of the Napoleonic wars the colonial empire of France had reached the lowest point in its history. Of the very extensive territories which the Bourbon monarchy had accumulated during the seventeenth and eighteenth centuries, there remained in America only a few small islands in the Gulf of St. Lawrence and the Caribbean; in Africa only Senegal, Reunion and Madagascar (the latter practically abandoned); and in Asia only Pondicherry and a few small trading posts on the mainland of India. France had been forced to yield her place among the great colonizing powers of the world.

The course of events during the nineteenth century, however, has on more than one occasion borne testimony to the marvelous recuperative power of the French people; and in no more striking respect has this power been shown than in the development of new interests beyond the seas. Through the acquisition of Algeria and other important territories in Africa, and the assumption of protectorates over Tunis, Madagascar and extensive regions in Indo-China, the French have regained for themselves a place second only to Great Britain among the colonial powers of the present day.

The Revolutionary and Napoleonic era marks, therefore, a decisive turning-point in the colonial policy of France, as it does in the other domains of French administration. Indeed the student of comparative colonization will find, in the present system, very little that may properly be looked upon even as a heritage of the old régime; for after 1815 the old ideas of colonial government and the old methods of centralized control were so far abandoned as to leave between the old colonial system and the new scarcely a single connecting link.

One important feature which marked the administration of the French colonies before the Revolution was the vigorous endeavor to secure absolute uniformity in the governance of all the dependencies, with little provision for differences in local conditions. Despite the

enormous disparity in point of environment and in the kind of problems likely to arise, the French dominions in Canada, for instance, were given frameworks of administration which were substantially like those employed in India, and were subjected to almost the same supervisory methods. The home government, as De Tocqueville has remarked, essayed to take the place of Providence by applying its infallible formulas of administration to all the Bourbon dependencies alike.

This passion for uniformity and symmetry the French have, indeed, carried down into several fields of contemporary home administration, notably into the sphere of local government; for one finds more than 36,000 communes, with populations ranging from fifty to half a million, all provided with the exactly same administrative machinery and supervised in precisely the same way. In the contemporary colonial system of France, however, this inelasticity is noticeably absent. Although the dependent territories of the republic are now almost wholly within the category of "tropical dependencies," and although they differ from one another far less widely than did the colonies of the old régime, no serious attempt is made to conform the administration of all to any single plan or theory. On the contrary, the present system exhibits entire flexibility both in the methods of supervising colonial affairs from home, and in the organizations of the colonies themselves.

Algeria, the most important of the French dependencies, is treated as an integral part of France. Like the other local units of the republic, it comes under the supervision of the minister of the interior; it has its share of representation in the French parliament; and its organization, both of departmental and of local government, conforms generally to that of France itself. The protectorates, including Tunis and the larger part of Madagascar, are under the supervision of the minister of foreign affairs, but they retain their own local organization. All the remaining French territories—the colonies proper—are in charge of the minister of colonies. There is now, therefore, a decentralization of control which contrasts very strongly with the excessive centralization of the old dominion, and even with the very symmetrical policy which characterizes other branches of French administration at the present day. This division of control has, on the whole, been advantageous; for it has helped to give French colonial policy in the nineteenth and twentieth centuries an elasticity which it utterly lacked in the eighteenth, and it has

likewise served to mitigate that pernicious faith in administrative shibboleths which has too often been the curse of French politics both at home and abroad.

One feature which serves to distinguish the present colonial system of France from that of Great Britain, Germany or the United States, is the practice of giving to dependent territories a certain representation in the official councils of the mother state. Algeria, being regarded as part of France, has of course its quota of representatives—three senators, representing the three departments of Algiers, Oran, and Constantine, and six deputies, selected two from each department. The election procedure is to all intents and purposes the same as in France, the franchise being confined to Frenchmen and naturalized Europeans.

The protectorates, including Tunis, have no representation at all in the French parliament although the degree of control exercised over them is fully as great as in several other territorial dependencies. Of the score or more of "colonies proper," only seven have the right to send representatives<sup>1</sup>—Martinique, Guadalupe, French Guiana, Senegal, French India, and Cochin-China; to others not less important—as Tonkin, Cambodia, Dahomey, French Congo—no rights of representation are given. For this discrimination there are historical reasons only. The colonies represented are, it will be noted, the older dependencies, which acquired their right during a period when the idea of a gradual assimilation of the colonies to the mother country was regarded as the true goal of colonial administration. This idea, indeed, dominated French statesmanship until less than two decades ago, when it gave place to the notion that neither assimilation nor yet mere exploitation, but a mean between the two, should be attempted. Of late, therefore, the French authorities have not looked with favor upon any movement to carry the system of colonial representation to its logical conclusion by according the privilege to the newer colonies. On the contrary, on more than one occasion, it has been seriously proposed to withdraw the right of representation from those colonies which now possess it.

<sup>1</sup> The privilege of sending representatives was first accorded to the colonies during the Revolution; but it was abolished by the constitution of the year viii and was not restored till 1848. In 1852 it was again suppressed by the Second Empire, but was reestablished in 1870 by the government of the national defense, which in 1875 made it a constitutional fixture. Since then decrees regulating its exercise have been issued from time to time.

Among the seven colonies now holding the privilege, no rational basis of representation is established, senators and deputies being allotted without any due regard for differences in population, in area, in wealth, or in contributions to the national exchequer. The distribution, so far as it goes, rests upon a purely arbitrary basis. Martinique, Guadaloupe, and Reunion have each one senator and two deputies; French India has one senator and one deputy; French Guiana, Senegal and Cochin-China have each a deputy but no senators. Thus the three small islands of Martinique, Guadaloupe and Reunion have a larger representation than that of all the other colonies put together, a share which is, indeed, equal to that of the whole dependency of Algeria. That Algeria, with its five millions of population, should be entitled to no greater representation than the three islands, with only five hundred thousand, is a proposition so difficult to maintain, that the colonies have in some quarters come to be regarded as the "rotten boroughs" of the French political system. Any attempt at a redistribution would, however, serve only to open the whole question as to the merits and defects of the system of colonial representation, a discussion which none of the leading French political parties seem to desire.

The methods by which the various dependencies select their representatives afford further illustrations of the elasticity of the system. In Algeria, as has been said, the natives do not vote at all. In Martinique, Guadaloupe, and Reunion they hold the franchise on equal terms with Frenchmen, and the same is substantially true of Senegal. In French India and in French Guiana they have a right to vote, but not on equal terms with the French inhabitants; yet even with the handicap they hold a dominant hand in the elections. In Cochin-China they are almost entirely shut out, and the French residents are in control. The arrangements in each case are made by special decrees issued from time to time since 1870, each seeking to meet the circumstances of the particular colony in question.

Except for this variation in the franchise from colony to colony, the electoral methods pursued in the dependencies are much like those at home. Voting lists, compiled under the same sort of regulations, are used both in the election of deputies and in the local elections; the voting takes place (except in Senegal) by written ballot; the colonial representatives are paid out of the national purse, and they enjoy at Paris all the privileges and legal immunities of the regular French members of parliament. In the chambers they possess the

right to discuss and to vote upon every project, whether it is likely to affect the interests of the colonies or not, a right which they have not hesitated to use.

Although the system of colonial representation has not been without its very distinct advantages, particularly in affording the colonies a recognized official channel through which their grievances might be effectively set forth, it has, without doubt, fallen far short of expectations. In a senate of three hundred and a chamber of six hundred members, the colonial representatives form so insignificant an element that their voting strength is scarcely sufficient to make their support worth the interest of any of the leading political factions. During the last decade they have swung mainly into the ranks of the socialist party, and have on the whole found place more generally among the opponents than among the supporters of the administration. On somewhat rare occasions men of marked ability have been sent to Paris from the colonies; but in the main the colonial senators and deputies have not risen to the general level. In this respect one marks a notable contrast between the delegation from the colonies and the little group sent regularly from Algeria, the latter deputation setting a distinctly high standard, and in the considerable number of members which it has furnished to recent French ministries fully justifying its existence. That the colonies proper, on the contrary, have not on the whole risen to their opportunities in the matter of representation is shown by the caliber of the men whom they sometimes choose, men like the Indian deputy from Pondicherry, for instance, whose corrupt manipulations became a public scandal, or like the negro deputy from Martinique who, after his election, refused to proceed to Paris because he had been warned by spirits not to venture upon the seas.

Not infrequently the colonies select as their representatives men who have already taken an active part in French politics at home; but in the main this practice is not followed. In either case, the objection is often made that the colonial deputies interest themselves too prominently in the purely domestic politics of the republic, and too frequently lose sight of the special colonial interests which they are supposed to guard. One is often reminded, in this connection, of the important occasion upon which a French ministry was ousted from office upon an interpellation relating to a purely local matter, the sponsor for which was the deputy for Cochin-China. Although this colonial deputy was perfectly within his parliamentary rights in

embarrassing the government at a very critical moment upon a question relating to a central *mairie* for Paris, many Frenchmen naturally ventured to raise the question whether his energies might not have been more appropriately employed. From the very nature of things, a colonial representative enjoys in parliamentary circles a certain amount of prestige and special influence; and these advantages, it is claimed, he too often uses improperly.

The methods by which senators and deputies are selected in the colonies have also been rather harshly criticised. There are those, indeed, who urge vigorously and with a good deal of circumstantial evidence to support them, that the colonial representatives do not in many cases faithfully reflect the public opinion of the colonies from which they are accredited. In support of these allegations, it is pointed out that the natives who have voting rights do not exercise these rights in any reasonable degree. The proportion of polled to registered votes is, no doubt, discouragingly small in almost all the colonies at every election; and this is not because the French element in the colonies seeks in any sinister way to throw obstacles in the way of native voting. On the contrary, it appears that rival French leaders very eagerly exploit the native vote, and are frequently charged with bringing natives to the polls through corruption, undue influence, or even open intimidation. Were the native voters left alone, it is believed that even the present meager showing would be considerably reduced.

In view of the small percentage of native votes polled, and especially in view of the notorious activity of French officials in connection with the colonial elections, it is indeed questionable whether the colonial deputies sometimes represent much more than the official class in the colonies. The influence of this large official class, particularly with the native leaders, is obviously very great, and no doubt is usually exerted to the full in an endeavor to secure the election of representatives satisfactory to itself. It has been shown in a parliamentary investigation in Senegal that these functionaries make their arrangements with the native chiefs, who conduct their followers in bands to the polls, where they indicate their choice according to instructions. The chiefs, it seems, are the only factors to be reckoned with, each village headman having a voting strength of one, two, or three hundred ballots, as the case may be. The whole proceeding thus becomes a *farce électorale*, the representative chosen being usually some one whom the native voters have never seen and of whom most of them have never heard. Cases are on

record in which deputies have been chosen to represent colonies which they have never even visited, their electoral campaigns being managed by officials on the ground. The deputy, owing his election to the officials, is thereby committed to their support; and the exertion of influence proceeds in a circle, sometimes with exceedingly vicious effects.

In all the represented colonies except Cochin-China the native element has a decisive numerical preponderance; and even where it has not equal weight with the French it is nevertheless strong enough to control the elections. This the French inhabitants regard as a substantial grievance; for the natives contribute only insignificant sums to the exchequer, and, with a few unimportant exceptions, furnish no recruits to the military establishment; whereas the colonial Frenchmen bear the brunt of financial and military burdens, and yet are allotted only a minor share in the choice of those who assume to represent the wishes of the colony in the councils of the nation. Hence the system which was designed to harmonize the interests of the two elements in the colonies seems to have exerted an influence in exactly the opposite direction. As a theory, the extension of the franchise to tropical natives had much that served to commend it to the French people, particularly in view of the prevailing democratic temper of 1848 and 1870; but in its practical workings it has been productive of discontent, anomalies and even abuses. Paul Leroy-Beaulieu does not hesitate to condemn the electoral system of the colonies as an "absurd institution;" and there seems to be a growing conviction that there is ample room for its reform.

One aspect of the question which has elicited discussion in recent years relates to the bearing which the system of colonial representation has upon the question of political development within the colonies themselves. In the colonies of France the march to colonial autonomy, or toward anything approaching autonomy, has been extremely slow; in none of them is there yet the faintest recognition of this principle. Elective assemblies have, it is true, long since been established in several of the dependencies; in some the members of these local bodies are elected on a basis of manhood suffrage pure and simple, in others by complicated plans which provide, or attempt to provide, for the representation of interests rather than for the representation of numbers; but in none is the elective organ able to exercise any important control over the actions of the executive. One may even doubt whether the influence of these elective

organs over the conduct of administration is a whit greater today than it was when the system of local representative government was inaugurated—in some cases more than a quarter of a century ago. It is now over sixty years since we were assured by Lord Durham, in his epoch-marking *Report on the Affairs of British North America*, that the grant of representative government to a colony must be followed in time by the grant of responsible government. It is a vain illusion, Durham declared, to expect that those who represent the people in any colony will permanently content themselves with a mere voice in legislation; they will inevitably insist upon administrative control. That the one fact does not as assuredly and as readily follow the other as Durham supposed, the history of the French dependencies seems to show; and it is possible that the practice of affording the colonies a liberal representation in the home parliament has not been without its influence in this direction. One of the most powerful among the various causes which assisted in securing political autonomy for the larger colonies of Great Britain was the tardy, but none the less effective, recognition by the British parliament of its own ignorance and utter helplessness in dealing with the local problems of distant colonies. Had the British parliament numbered among its own members men who held mandates from the colonial possessions, this recognition of helplessness would in all probability not have come so soon, and parliament might reasonably have continued to assume its ability to legislate intelligently for the various colonies. It is true, one may hasten to add, that political conditions in the French and British colonies differ so widely as to forbid one to reason from analogy; but the fact seems to remain that anything which serves to foster in the minds of home legislators an idea of their own capability to deal with the local affairs of distant dependencies must in the nature of things have its place among the obstacles in the way of colonial autonomy.

The French government of the present day, therefore, aware that a half century of experience has not served to stamp with marked success its ventures along the path of political assimilation, finds itself in the somewhat awkward predicament of not being ready to carry the principle of colonial representation to its logical conclusion. On the other hand, it cannot easily withdraw the representative privilege from those colonies to which it has been accorded; for the system has come to be regarded, both in France and in the colonies, as an incident of republicanism, since it was established by the first

republic, revived by the second, and made a constitutional fixture by the third. For sentimental reasons, then, if for nothing more, the elimination of the colonial representatives need hardly be looked for in the very near future. The French have halted, accordingly, between the Spanish and Portuguese systems, which accord representation to all dependent territories, and the British system, which grants representation to none.

Whatever the outcome to the colonies may be, to the student of comparative colonization the experiment in colonial representation has not been without its distinct value; for, though it is not safe to generalize broadly from the working of a system which has scarcely had a complete or sympathetic trial, it is certain that the difficulties encountered by France are substantially those which are likely to be encountered by England or by any other country which attempts, on a broad scale, to inaugurate and maintain any plan of imperial federation which gives the colonies representation in the home parliament. The difficulties involved in securing an equitable basis of representation, the questions how far and under what handicaps tropical natives should share in the right to elect, the problem of protecting the natives against political exploitation and of holding the political activities of colonial functionaries within proper bounds, as well as the bearings of such a system upon the political development of the dependencies themselves—these are matters upon which French experience throws considerable light. France was made to do service in the nineteenth century as a “laboratory for political experiments;” and her experiments in the direction of the political assimilation of dependent territories, although they have perhaps failed to attract their proper share of public attention, have not been without important value to students of comparative politics.

## AN INTERCOLONIAL PREFERENTIAL EXPERIMENT

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The skillful policy of Sir Wilfred Laurier, the discussions of the colonial conferences, the propaganda of Mr. Chamberlain, and the activities of the colonial legislatures have served to bring the subject of preferential trade most prominently before the attention of the British public. Unfortunately the consideration of the question has been almost exclusively of a partisan character, the merit or expediency of the policy being lost sight of amid the stress of national political issues. The question, however, is one which readily admits of scientific economic treatment, since the history of imperial relations, and more especially the reciprocal economic policies of the several groups of colonies offer abundant material for an impartial historical and political investigation. The preferential program is not new or experimental; it has been tried both as an imperial and intercolonial policy by imperial and colonial governments alike. The Canadian, Australian and South African colonies have all attempted to work out within their several groups a more perfect political organization through some system of commercial coöperation or fiscal preference. The experience of the Australian group is especially valuable and instructive to the student of imperial politics, on account of the favorable conditions under which the experiment was made. On the one hand, the isolation and the geographical unity of the colonies, the uniformity of their legal systems and political institutions, and above all the racial, social and religious unity of the inhabitants combined to weld the colonies into an organic whole; on the other hand, the diversity of economic life, the natural independence of the colonies, thanks to an open sea-board, the irreconcilable differences in their fiscal systems, the ambitions of local politicians, the jealousies of competing cities, and the selfishness of particularistic interests impelled each state to maintain a separate existence, and to pursue a course of free and independent action. A brief chapter in the history of the working of these conflicting forces on the economic and

political life of the colonies will not only serve to point out the true relation between the policy of intercolonial preference and the development of an Australian nationalism, but may also throw some light upon the vaster question of the proposed economic organization of the empire upon the basis of an imperial preference.

The early history of Australia is a history of the separation and expansion of distant settlements. A considerable period elapsed before the isolation of the colonies was broken down through the rise of a profitable intercolonial trade. But, unfortunately, the growth of social and economic intercourse was not permitted to proceed unhampered; provincial independence, though favorable to the development of local resources, was productive of divergent interests and conflicting fiscal policies. At first the local governments had no clearly defined commercial programs; they each and all adopted the easiest and readiest means of taxation without regard to economic principles. Generally speaking, the tariffs were revenue producing though incidentally protective features were introduced. The dissimilarity of economic conditions and the divergent needs of the local treasuries served to strengthen their fiscal differences. It was but natural under these circumstances that the common commercial interests of the Australian group failed to secure proper recognition in the local legislatures. Financial and economic considerations alike seemed to favor an independent commercial policy in the several colonies and the imposition of intercolonial duties. The rapid development of intercolonial trade furnished the needy exchequers with a productive source of revenue, and at the same time awakened the selfish opposition of the producing interests to the free importation of competing products.

But the policy of economic segregation, of treating the sister colonies as alien states, did not pass unchallenged. There was but a feeble sense of community of interests, but at least efforts were made in some of the colonies to secure a limited measure of reciprocal free trade. This policy, unfortunately, was restricted in its application, and accompanied moreover by the adoption of the discredited system of intercolonial discrimination. In some of the colonies the general customs acts were legally or conventionally relaxed in favor of certain privileged members of the group, but strictly maintained for revenue or protective purposes against their less fortunate neighbors. In New South Wales—one of the preferential colonies,—an interesting attempt was made by the mercantile community to induce the

legislative council to broaden the scope of the fiscal privilege so as to include all of the Australian colonies. The proposal did not aim at a Zollverein, but simply to bring about a genuine system of preferential trade based upon the principles of intercolonial freedom, fiscal independence, and a tariff against the outside world. The supporters of the measure condemned the existing discrimination against some of the sister states as unjust in principle and productive of jealousy and ill feeling, and strongly pleaded for the cultivation of closer economic relations between the colonies, even at the expense of a small temporary loss of revenue. The governor however, for imperial reasons, opposed the principle of an Australian preference as an improper encroachment upon the sovereign powers of parliament over the commerce of the empire. The proposal, in his opinion, was open to a still graver objection of a financial character. If the privilege of free importation were extended to the other Australian colonies, the government might be called upon to apply the principle in favor of more distant dependencies of the crown, a policy which would inevitably be productive of considerable loss and inconvenience to the local treasury. The opposition of the governor was decisive; the council dropped the proposal without further consideration. In the judgment of the legislature a general intercolonial preference was of far less consequence than the local revenue or the economic advantage of the colony. Whatever may have been the grounds for this decision, whether intercolonial jealousy, economic antagonism, or fiscal necessity, the result clearly evidenced that the mother colony was not prepared to take a liberal and enlightened view of Australian commercial relations. Parochial politics were permitted to outweigh national interests. At a critical moment when her influence might have been determinative of the fiscal policies of the other colonies, she foolishly threw away a most splendid opportunity of promoting the commercial and political union of the Australias.

But in pursuing their selfish and irrational course of fiscal legislation the colonies had overlooked the demands of imperial policy. At the time of the founding of New South Wales, the principles of the mercantile system were in the ascendancy. Not until the triumph of free trade doctrines were the colonies released from the many irksome restrictions imposed on colonial trade in favor of British commerce, and permitted to determine largely their own fiscal policies with a view to their particular interests. But in freeing the colonies from protectionist limitations on foreign trade, the English government was guilty

of placing restrictions of another kind on the fiscal freedom of the colonies in the interest of imperial free trade. Naturally the home authorities did not look with favor upon schemes of reciprocal inter-colonial preference in the advantages of which they did not participate, and which moreover were incompatible with the commercial policy of the empire. Although not objecting in practice to the imposition of customs duties for general revenue purposes, they set their faces determinedly against the levying of discriminatory duties in the colonies. The adoption of a system of intercolonial preference, it was declared, would necessarily lead to fiscal retaliation, and to a system of protective tariffs and differential duties at variance with the imperial fiscal policy. In a circular dispatch of 1843, Lord Stanley instructed the governors to use all "the legitimate influence" of their offices to prevent the introduction and passage of such bills, and if necessary to withhold assent to their enactment. If these precautions were not sufficient to check such measures, the royal veto would be inevitably forthcoming. The former policy of favoring British commerce by a system of preferential tariffs was now discarded in favor of fostering international free trade by their abolition. The home government still maintained the right to regulate the commercial policy of the empire; henceforth it is true, they did not directly interfere with colonial tariffs, but they indirectly effected the same object through the exercise of the treaty making power and the royal veto. There was still an imperial fiscal policy; only the principle was changed from protection to free trade.

Notwithstanding the secretary's instructions and the royal veto, the practice of discrimination still went on. Several of the colonies continued the preferential policy of admitting British or colonial products upon the most liberal terms, while levying a higher rate of duty upon the goods of foreign states and less favored sister provinces. Nor was the colonial secretary any more successful in preventing the growth of intercolonial protective duties. His lordship's policy worked out its own defeat. The chief practical result was to cut off the limited privilege of free intercourse then enjoyed under the preferential tariffs, and to frustrate the incipient movement toward reciprocal free trade. Instead of breaking down the system of inter-colonial protection, new barriers were now raised against freedom of intercolonial intercourse. Under the plea of financial necessity, the local legislatures were prone to enter upon the policy of fostering domestic interests at their neighbors' expense. With the growth of a

particularistic spirit, the fiscal programs of the colonies drifted farther and farther apart. The two leading provinces were alike guilty of imposing protective duties on leading articles of import from the sister states. Although this policy was frankly defended in some quarters on purely protective grounds, nevertheless the legislative councils of both colonies were artful enough to seek to conceal the real purpose of their measures behind the pretense of complying with the demands of the imperial policy forbidding discriminatory duties. The evil results of intercolonial tariffs were speedily felt by the commercial community, and an active agitation arose for the repeal of the iniquitous duties. The question was taken up by the council of New South Wales, which unanimously adopted a resolution praying Her Majesty to disallow the recent retaliatory legislation of their neighbor. In the course of the debate, the colonial secretary threw out a suggestion for the appointment of a governor-general as the best means of unifying the fiscal policies of the colonies. He clearly perceived that a mere policy of negation,—of appeal to Downing street for the disallowance of pernicious legislation—would not harmonize the divergent tariffs of the several states. The suggestion was quickly seized upon by Governor Fitzroy, who recommended to the secretary for the colonies the advisability of creating a central intercolonial authority for the consideration of common Australian affairs. The colonies, he urged, should not be permitted to

pass hostile or retaliatory legislation calculated not only to interrupt their commercial intercourse with each other, but to create feelings of jealousy and ill will among them, which if not checked, might lead to mischievous results.

The advice was most timely. The intervention of the imperial government was urgently required to rescue the colonies from a hopeless confusion of hostile tariffs and conflicting fiscal legislation. New South Wales and Van Dieman's Land were already in collision. Soon after South Australia adopted a complex preferential schedule which would delight the heart of the modern tariff reformer. About the same time New Zealand framed her tariff upon the simple basis of restricting taxation to a few articles of general consumption. In short, an exclusive consideration of their own separate interests had brought about a strange medley of fiscal regulations and tariff anomalies in the commercial relations of the colonies. The principles of free trade, protection, preference, and discrimination were embodied

in the tariff policies of one or the other of the provinces. The local legislatures were justly chargeable with a perverse shortsightedness in flagrantly disregarding the general welfare of the Australian group, with which the economic prosperity and social happiness of each colony were necessarily bound up.

The question of intercolonial relations came before the home authorities at the very moment when the secretary for the colonies was working out an improved constitutional organization for the Australias. Earl Grey quickly perceived the intimate interdependence of the economic and political factors in the life of the colonies. Fiscal independence was the fountain source of intercolonial difficulties. Some means must be found of introducing that unity and harmony into the commercial policies of the colonies, which was essential to the development of their splendid national resources. To this end, he suggested the creation of a common legislative organ endowed with limited powers in respect to affairs of general Australian interest. The primary purpose of his lordship's federal proposal was to forestall the probable establishment of a line of customs houses along the inland boundaries, the irritation of which would inevitably destroy the social and economic unity of the Australias. The whole question of colonial constitutions was later referred to the committee on trade and plantations, for more careful consideration. This body soon after presented an able report in which the fiscal policy and federal principles of his lordship were worked out in more detail. As a cure for the evil of intercolonial duties, the committee recommended the setting up of a federal legislature of limited powers, together with a single tariff and unrestricted freedom of trade throughout the colonies. A uniform customs system, it was seen, could alone effectually avoid the fiscal preferences and fraudulent evasions of the revenue laws which would result from such halfway measures as reciprocal agreements or intercolonial free trade. First and foremost among the powers conferred upon the proposed general assembly were those in respect to commerce, "the imposition of duties on imports and exports," and the levying of shipping dues or charges.

The Australian colonies government bill, which was soon after introduced into the commons, went one step farther than the committee's recommendation, by prohibiting both the general assembly and the local legislatures from levying any kind of discriminating duties, or from imposing any differential transportation charges by which the products or ports of any one colony might be favored at the

expense of another. In order to safeguard the economic and political interests of the motherland, a similar inhibition was laid upon the imposition of preferential or discriminatory duties and shipping charges in violation of Her Majesty's treaty obligations. The insertion of the first of these comprehensive provisions in the federal constitution was designed to put an end *ab initio* to the whole system of colonial and imperial discrimination; the object of the second was to impose on Australia the commercial policy of the empire through the treaty making power.

Meanwhile the question of a uniform tariff had been carefully canvassed by a limited but interested section of the Australian press and public. Popular opinion, so far as expressed, was far from uniform or consistent throughout the colonies. In the two larger provinces the views of the commercial community were mostly favorable to the principle of customs uniformity, though much divided upon the expediency of parliamentary intervention in fiscal matters, and as to the impartiality of a general assembly, and its ability to frame a satisfactory federal tariff. A commercial union of the colonies was considered the greatest boon that federation promised to confer. Although some doubt was expressed as to the effect of federal customs regulation upon the local treasuries, it was generally felt that the blessing of intercolonial free trade would more than compensate for any loss of revenue from the remission of intercolonial duties. But the producing interests looked upon a Zollverein, with the consequent abolition of intercolonial duties, in an entirely different light; in their eyes it was a dangerous attack upon the political and commercial autonomy of the colonies; it involved the sacrifice of special local interests which had been built up under a system of protection. The views of the particularists were defended on financial, economic and imperial grounds. Viewed from the fiscal standpoint, the adoption of a uniform tariff would be disastrous to the revenues of the smaller colonies, whose tariffs required to be adapted to the changing necessities of public finance. The economic conditions of the colonies were likewise so essentially different in character, that a uniform system of fiscal legislation could only be introduced by sacrificing the particular interests of the weaker colonies to the demands of the stronger. To disregard these permanent conditions was to defy the laws of nature herself. The policy of intercolonial free trade was equally objectionable for imperial reasons, since it would stimulate and sanction the very evil of differential duties within the empire which

the government was desirous of putting down between the colonies; it would foster the development of a system of Australian protection at the expense of other portions of the royal dominions. In truth, the splendid conception of an Australian Zollverein had taken but a feeble hold upon the minds of the electorate in any single colony. It served to call out the selfish interests of favored groups, rather than to appeal, as a national issue, to the serious consideration of the general public.

In order to overcome the objections of the colonists, certain material alterations were made in the bill on its presentation to the house the following session. The colonial legislatures were endowed with a liberal measure of fiscal autonomy; they were empowered to levy such customs duties as they might see fit, provided only they were not of a differential kind, and did not contravene certain other regulations of minor importance. The language of the proviso, though not so comprehensive as that of the original bill, was sufficiently inclusive to veto the adoption of a policy of intercolonial reciprocity, or the grant of any special most favored nation privilege as between the colonies. The constitutional limitations of the former bill in respect to the levying of duties, bounties, or drawbacks of any kind whatsoever, or the imposition of shipping dues at variance with Her Majesty's treaty obligations were however retained both for the general assembly and the local legislatures.

After an animated debate the federal provisions of the bill were carried by a large majority in the commons, but in the upper chamber, the criticism of the opposition was so severe that the government thought it advisable to drop the federal clauses. The sister tariff provisions, however, were passed through both houses without the slightest discussion. The imperial parliament had no qualms of conscience in restricting the fiscal freedom of the colonies in favor of imperial commerce. Discriminatory duties were assumed to be injurious to the commercial interests of the colonies because they were found to be harmful to English trade. The question of the applicability of imperial restrictions to colonial conditions, or their compatibility with colonial feeling and policy was not even taken into consideration. The effect of these illiberal commercial provisions was to seriously restrict the fiscal freedom of the colonies in seeking to work out a system of reciprocal preference or limited intercolonial free trade. The intervention of the parliament at Westminster was due in the first place to a desire to vindicate the supremacy of the

commercial policy of the empire against the narrow and particularistic legislation of the colonies; and secondly, to the necessity of putting an end to the vagaries and inconsistencies of the tariff policies of the several States. However indefensible on constitutional grounds the intervention of the sovereign will of parliament would have been, if based solely upon a consideration of imperial interests, there can be little question but that its action was economically justifiable in view of the confusion and conflict of colonial fiscal legislation. The local legislatures had so abused their commercial powers as to lead the colonists themselves to call for the intervention of the imperial government to save them from retaliatory self-destruction.

For this contretemps, the colonies had themselves largely to blame. The policy of intercolonial preference was given a selfish and contracted application. The principle of protection took possession of the local legislatures; economic particularism and local self-interests were developed at the expense of the sister states. The system of mutual preference, which at first had been based upon the enlightened principle of a community of intercolonial interests, soon lost its original free trade character. The liberal preferential features of the several tariffs gave place to protective and discriminatory provisions. The colonies became competing states, whose reciprocal commerce was burdened with unfriendly customs duties. Instead of fostering the growth of intercolonial trade, and promoting the interests of Australian unity, the preferential policy was made to assume the indefensible form of provincial protection and intercolonial discrimination, the natural result of which was not only to affect prejudicially the commercial interests of all the colonies, but what was even more serious to provoke a spirit of alienation, a false local patriotism, and a feeling of resentment between the favored and less fortunate colonies. An imperial act was required to rescue the colonies from the threatened danger of chronic economic friction and political antagonism. In the language of the *Sydney Herald*:

Had not the policy of the British empire prohibited the freaks of selfishness, we should assuredly find petty legislatures covering the tables with bills for the restriction of commerce, for the protection of native industry, for the control of labor, \* \* \* and for every encroachment, monopoly, impertinence and folly which covetousness of caste and class have ever clothed in the garb of patriotism.

The path of colonial preference, which at first appeared to point the way to the realization of an Australian nationalism, proved to

be but a devious track, in following which the colonial legislatures wandered far afield into the blind morasses of intercolonial protection and provincialistic self-interest. In short, the jealousies of the local legislatures, and the selfishness of privileged interests within the several colonies, not only succeeded in defeating the beneficent operations of a limited intercolonial preference, but also managed to nullify the efforts of imperial and colonial statesmen to bring about a commercial or political union of the Australias. If, then, the policy of intercolonial preference was so easily turned aside from its original liberal principles into an instrument of protection, can it be safely assumed that the colonies of today, whose fiscal programs and political ideals are decidedly nationalistic in character, will be less narrow-minded in their commercial policies, or more imperialistic in their attitude toward the motherland and the sister states, than the Australian colonies showed themselves to be? If, as has been seen, the working of a protectionist preferential policy occasioned confusion of tariffs, retaliatory legislation, and estrangement of feeling between neighboring provinces, whose commercial and political interests were fundamentally one, is there not reason to fear that the adoption of that same policy within the empire, in which a hundred fold greater diversity of interests prevails, might likewise introduce an element of discord into the happy autonomous relations now existing between the self-governing colonies and the home land? However this may be, the subsequent arbitrary and ungenerous disavowals of the various agreements for reciprocal freedom of trade along and across the Murray, serve to bring out clearly the danger of fiscal antagonism which is apt to arise from the application of strict commercial principles to intercolonial relations. Notwithstanding the solemn nature of these conventions, and the advantages they offered to intercolonial trade, the several governments did not hesitate to repudiate at will their treaty obligations, whenever the claims of the local treasuries, or the clamors of local protectionists appeared to favor the reimposition of border customs duties. The monopolistic spirit of the trader was stronger than the social instinct of the people. The repeated repudiation of these limited concessions to freedom of intercolonial intercourse would go to prove, or at least suggest the inference, that the propensity to economic friction might be sensibly diminished, if the principle of reciprocal bargain or contract could be eliminated from the preferential program. If the policy of a general imperial preference be ultimately adopted, it may be found that the plan of the

Canadian government, in granting a voluntary preference as a national free will offering to the motherland, will afford the readiest mode of escape from the huckstering spirit and the irksome restrictions of an imperial convention.

But so long as the spirit of protection is dominant throughout the colonies, there can be little hope for a genuine system of preferential trade in which the commercial unity of the empire will be recognized between the various self-governing states as also against the outside world. The much lauded preferential policy of today is essentially a colonial and not an imperial policy; it aims at the furtherance of colonial interests, rather than at the promotion of the general commercial welfare of the empire. However much the uniform adoption of such a policy might contribute to the betterment of imperial relations, it would not furnish a solid foundation upon which a constitutional organization of the empire could be safely erected. The history of the nineteenth century strongly attests that a sense of the social and spiritual unity of a people, and not a materialistic conception of provincial self-interest, lies at the very heart of all true national and federal movements. The consummation of the Australian commonwealth exemplified this principle in a striking manner; a social consciousness had at last emerged; it marked a splendid triumph of the spirit of native nationalism over the selfish interests of particular groups. One looks in vain, both in England and the colonies, for permanent evidences of a similar great social movement for the economic and political unification of British dominions throughout the seven seas. In the face of the failure of the various colonial and imperial experiments, is it reasonable to believe that a preferential propaganda, however ably conducted, and however well adapted to the protectionist sentiment of the colonies, can overcome the social indifference and the political independence of the widely scattered groups of self-satisfied and self-assertive States? In brief, the experience of the Australian colonies appears to cast grave doubt upon the possibility of effecting a closer union, or a political federation of the empire, through the agency of any economic policy short of an imperial Zollverein. An appeal to the history of the formation of the American union, and of other modern federations lends confirmation to this opinion. Viewed in the light of the teaching of political experience, it may be said that the Australian experiment presents little that is distinctively new or striking; it rather repeats the plain lesson of history—that sister states must either confederate, or fall

a prey to the disintegrating forces of economic rivalries and political antagonisms. The sacrifice of fiscal independence is the high price of political unification—a price, however, which the colonies have decisively declined to pay in order to gain the questionable benefits of an imperial organization.

## THE PROBLEM OF INTELLIGENT LEGISLATION

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The larger aspects of the legislature and of its functions: the question of the right principle of representation, of the frequency of legislative sessions, of popular control and coöperation through the referendum and the initiative, have their bearing upon the quality of legislation, but they are essentially political questions, and beyond the range of the present discussion. This discussion is to confine itself to a problem of narrower scope, and somewhat technical in its nature, which may be stated as follows:

Given a legislature of average ability, fairly representative in character, not exempt from political bias or popular prejudice, but willing on the whole to act according to the best of its lights, such a legislature as we now have, and shall have for many years to come: how can it be enabled to perform its task most creditably and most efficiently?

This problem has of course always engaged the attention of legislative bodies, their attention far more than that of the people at large, and it is important to inquire why, after a hundred years' experience and experiments, a satisfactory solution has not been found, and why it is that only now the subject is beginning to arouse popular attention and interest.

America inherited from England both common law and forms of legislation, but not the conservatism toward the common law which until recently distinguished English legislation. From the beginning American governments exercised considerable freedom in moulding the law through legislative enactment, favored in this by the relative simplicity of conditions of property. The American spirit of versatility and power of adaptation manifested itself in new legislative ideas as well as in industrial developments. The willingness to try experiments in legislation has remained, and it has produced much material of considerable value. The attention which foreign governments and students give to some phases of our laws testifies to the interest which they arouse, and not infrequently to

their success. Many of the legislative experiments were at first crude, and the common American practice has been to see what defects would develop in the operation of an act and then amend it. This system worked reasonably well as long as the interests affected by bad legislation were relatively small and obscure or poorly organized, and the duty of enforcing laws was not taken too seriously.

Conditions in this respect, however, have changed with the growing power, scope, and complexity of private industrial and social action. Mechanical progress has multiplied dangers, and at the same time shown the way to obviate them. Organization and combination have increased social and business efficiency for evil as well as for good. The common carrier has become a railroad company, the open shop a department store, the guarantor a surety company, the conveyancer a title or trust company, the employee a member of a labor union. There is hardly a trade or industry that has not formed a national association to look after its interests. Familiar commercial abuses will appeal to the popular sense of wrong more strongly if manifested in a strong organization; more than that, the powerful organization will be measured by standards of commercial morality never applied to the individual merchant. There will, in consequence, arise a demand for the legislative control of relations which were formerly deemed purely private, and the demand will increase with the power to be regulated.<sup>1</sup> There will be greater watchfulness as to the operation, the observance, and the enforcement of such legislation on the part of the public, and greater resistance and power of resistance on the part of the regulated interests. Under these circumstances a very much higher degree of care in framing legislation will be required than under the old conditions. The realization of this fact accounts for the present movement toward improved methods of law making.

John Stuart Mill has said that

there is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws.

The United States is the only country in which this work is left entirely to a large political body possessing no particular qualifications.

<sup>1</sup> Note the length of the provisions of the Oklahoma Constitution regarding corporations, the longest article by far in the whole instrument.

In France and Germany important legislation almost invariably comes from the government. It is prepared by high officials, trained and experienced jurists and economists, who work under the guidance and advice of practical administrators with all the official information of a centralized bureaucracy at their command. Elaborate inquiries are instituted and the drafts of important measures are almost invariably published long before they go to the legislature, in order to receive the widest criticism. This whole preparatory work has rarely been described in print, but there exists an elaborate discussion of the best methods to be pursued in it from the pen of the formerly well known German publicist, Robert v. Mohl.<sup>2</sup> The *motive* of the German civil code are a typical monument of painstaking preliminary work for legislation.

England has abandoned the old haphazard system of legislation. Nearly all great public bills are now government measures,<sup>3</sup> and the treasury, since 1870, employs a parliamentary counsel who is the legal draftsman of the government. Information regarding that office may be found in the works of its first three incumbents, Lord Thring, Sir Henry Jenkyn, and Sir Courtenay Ilbert.<sup>4</sup> In England legislation is moreover aided by the many parliamentary and governmental inquiries the results of which are laid down in the numerous Blue Books.

An adoption of European methods in this country would involve a revolution in the relations of the executive toward the legislature which even if desirable it would take a long time to bring about. The question that presents itself to us at this time is what improvements the legislatures themselves might be induced to adopt.

The shortcomings of our present system may be said to be lack of responsibility, lack of expert advice, and lack of principle.

1. *Responsibility.* We know how much our jurisprudence has gained through the system of written opinions published in reports,

<sup>2</sup> Die Auffassung der Rechtsgesetze, in *Staatsrecht, Völkerrecht und Politik*, vol. ii, p. 375-613, Tübingen, 1862.

<sup>3</sup> The statistical table given by Mr. Ilbert on p. 215 of his *Legislative Forms and Methods* shows that private members introduce about three times as many bills as the government, but that the government succeeds in passing about three times as many bills as private members. The total output of legislation in England is small, in 1900 altogether sixty-four public acts.

<sup>4</sup> Preface to Sir Henry Jenkyn's *British Rule and Jurisdiction beyond the Seas*, Oxford, 1902; Sir C. Ilbert, *Legislative Methods and Forms*, Oxford, 1901; Lord Thring, *Practical Legislation*, Toronto and Boston, 1902.

through which the work of every judge of an appellate court is subjected to the scrutiny of the legal profession. But how can the responsibility for a bad piece of legislation be brought home to any one?

Any member of the legislature may introduce any bill he pleases, and his doing so does not even necessarily mean that he assumes any responsibility for its form or contents. In the German reichstag it requires the support of fifteen members to introduce a bill that does not come from the government, and practically all privately initiated measures are backed by some political party. It has been suggested that it might be well to limit each member of a State legislature to a small number of bills, to induce him to exercise some care and discrimination. If this were regarded as trenching too much upon his privileges, he might at least be required, as a condition of having his bill considered by a committee, to state at whose request, at the instance of which interest or organization, he introduced a measure; still better, to furnish a memorandum of the purpose of the bill and an explanation of its provisions, as is now common in the national legislature when a bill is reported favorably by a committee. This would ensure the correction of many errors and would tend to fix responsibility. The lobby as a recognized and regulated institution might be made to serve the same end.<sup>5</sup> All this could be accomplished by rules of the legislature. The publication of bills in advance of their introduction would be even more desirable. The requirement of previous notice exists with reference to special or local bills under constitutional provisions in about eight States. In England the law requires such previous notice for all rules of administrative bodies promulgated under statutory powers. In Germany the government publishes all important measures before they are presented to the legislature.

Such a requirement would hardly be practicable with reference to all public bills. But the practice might be adopted with advantage for so-called administration measures. While the executive cannot initiate legislation directly, he can do so practically through friendly members, and assume the political responsibility therefor. The practice is not uncommon now, and will probably grow in the future. It is not impossible that without any constitutional amendment, the

<sup>5</sup> See *Bulletin 2 of the Wisconsin Legislative Reference Department* by Miss Schaffner.

course of events may create a virtual power of executive initiation of legislation similar to that enjoyed by European governments.

The share of our executives in legislation at the final stage of the process is much larger than it is in most European States, but at present the sense of responsibility for its exercise is limited. While governors regard it as their duty to veto measures that are plainly unconstitutional or unworkable, they generally yield to the legislature in matters of policy. A freer exercise of the veto power than is now common, based upon looseness and faultiness of provisions, would however be tolerated not only by the people, but probably by the legislature itself.

In those States in which the governor has a considerable time after the adjournment of the legislature to examine bills passed at the end of the session (when the most important bills are usually enacted), such a function of censorship might be carefully and effectively exercised with beneficial results.

2. *Expert Advice.* There are two distinct kinds of advice that the legislature stands in need of, the first as to the content of legislation, the second as to its legal form.

As to the first, the theory is that the legislature is acquainted with the circumstances and needs of the people, just as the old jury was presumed to know of all open and public occurrences within the county. But as a matter of fact, most of the information necessary for intelligent legislation cannot be acquired without special study or even special training. In the case of subjects generally recognized as technical the legislature naturally relies upon experts. Often the information comes from interested parties; but even if impartial, private advisers cannot be expected to have that sense of definite responsibility toward the legislature which a permanent official in England or Germany feels toward a secretary of state.

Where the subject to be legislated on is one not supposed to be technical, the legislature commonly acts upon the vaguest impressions, reflecting popular beliefs and prejudices; and it must be confessed that with regard to many of the most important social and economic conditions, no better information has in the past been available.

As regards the correct legal form of expressing the subject-matter of legislative proposals, it is recognized that this is a task requiring technical learning. Giving due recognition to the large amount of painstaking legal work embodied in any volume of our session laws,

and without magnifying the blunders that occur too frequently, it is obvious that a systematic plan of dealing with this aspect of legislation would bring a much needed improvement.

The technical shortcomings of our statutes are chiefly due to the fact that they come from so many hands working without supervision and without a concerted plan. Each statute is apt to create to some extent an administrative machinery of its own, to have its own peculiar provisions for sanction and enforcement, to frame anew rules and principles applicable to already existing acts in *pari materia*. The multiplicity of separate provisions for separate statutes produces disharmony and confusion, and unnecessarily encumbers our law. What we need is something in the nature of the English clauses acts, or the great organic administrative legislation of Prussia and other German states, extended to the whole of our police legislation, so far as such work has not already been done by codifying acts and statutory revisions.

A risk peculiar to our legislation is the number and uncertainty of constitutional requirements. With adequate knowledge and forethought many obvious and needless errors might be avoided. In many cases, however, it is necessary to try an experiment with full consciousness of the constitutional risk, and await the decision of the supreme court. The judgment of the legislature, as to what the Constitution permits, weighs next to nothing with the courts, judicial professions to the contrary notwithstanding. And this is largely due to the fact that the courts know that the legislative decision does not represent thoroughly considered professional opinion.

The constitution of the legislatures is unfavorable to a high quality of legislative work. It has not even the benefit of permanent organization; after brief and intermittent periods of activity the legislative offices are closed, and the papers and records are turned over to the secretary of state. In the absence of trained and permanent legislative officials, the continuity of legislative experience and tradition is at present only maintained by the practice of reappointing the same members to the same committees, session after session, provided they reenter the legislature.

The lack of permanent organization is the very negation of the one thing indispensable to careful legislation: the professional attitude of mind. This means training for the work, devotion to it, and a reputation at stake in its proper execution, and without it high quality of workmanship is as unlikely in legislation as in any other

work. It would of course be idle to expect that habit of mind of a political assembly; expert assistance to the legislature is therefore essential to any genuine improvement of legislative methods.

The method in favor at present for providing such assistance seems to be the creation of legislative reference bureaus. This is due to the excellent work done in Wisconsin. In the long run probably a division of functions will be necessary by which the work of the reference bureau will be devoted to the task of gathering data of a bibliographical nature, while the work of draftsmanship will be assigned to some official in close contact with the legislature.

The collection of statutes, of bills, and of references to current literature is already a prominent part of the work of the reference bureau, and when once such bureaus shall have been established in a number of States or the existing State libraries can be interested in the subject, they should be induced to unite in the establishment of some central bureau which should issue informal bulletins giving full information of current legislative movements in the several States.

The work should further include the collecting and digesting of papers of legislative interest, that may be filed in the offices of the clerks of the legislature or of the secretaries of state. If funds can be made available for the purpose, every State should see to it that all executive documents bearing on legislation, especially veto messages or statements, that have been printed or preserved, should be published and the entire body of session laws indexed.

It would further be well to digest and index the reports of State and city administrative officers and boards, which often contain most valuable points regarding the operation and enforcement of statutes.

The collection of data other than bibliographical which are important for the information of the legislature, would fall beyond the province of the reference bureau. Nothing would be more important than the collection of judicial statistics, both civil and criminal, which so far has been entirely neglected in this country. For work of this kind, we must rely mainly upon the initiative and the example of the census bureau at Washington.

As for the work of draftsmanship, provision has been made in a tentative manner in several States for expert assistance to the legislature. In South Carolina the attorney-general is the adviser of the legislature, and he may require the assistance of the State solicitors,

for drafting bills.<sup>6</sup> The law officers of cities are likewise very commonly consulted or employed in the drafting of ordinances.

Law officers, however, hold their positions by political tenure for definite terms, and the same is generally true of their assistants. They are not therefore likely to acquire a sufficiently large experience in the technique of legislation, to develop anything like the office of the parliamentary counsel of the treasury in England.

An office or position within the legislature itself would have the advantage of closest contact with the members, and it would therefore probably be most widely used. A committee of the American Bar Association in 1886 recommended the appointment by the presiding officers of the two houses of a joint standing committee for the revision of bills, with power to employ counsel. In New York the two presiding officers may appoint three persons to draft bills at the request of the members or of committees.<sup>7</sup> In Connecticut there is a clerk of bills to whom every bill favorably acted upon by a committee, before being reported to the legislature, must be submitted for examination.<sup>8</sup> This is the only statutory provision for compulsory reference in this country. The value of a statutory requirement is not to be underestimated, even though it be not directly enforceable. Much more important, however, is the tenure and status of the clerk or actual draftsman by whatever name he goes. The position should not be practically limited to one session of the legislature, as it is in Connecticut where the clerk of bills expects to advance at the next session to the place of engrossing clerk.

The national house of representatives has the benefit of the services of two clerks whose positions, as at present filled, probably come nearer to representing the professional element in the legislative part of the government than anything else in this country: the clerk of the speaker's table, and the clerk of the committee on appropriations, both practically permanent and well paid officials.<sup>9</sup> A clerk of the committee on judiciary or on enrollment or on bills in the third reading (as in Massachusetts), who would work himself by faithful and intelligent service into the confidence of the house might well develop into a legislative expert and something like a permanent parliamentary counsel.

<sup>6</sup> Civil Code, 1902, sec. 21, 644.

<sup>7</sup> New York Legislative Law, sec. 23.

<sup>8</sup> General Statutes, Revision 1902, sec. 37.

<sup>9</sup> The former position is held at present by Mr. Asher C. Hinds, the latter by Mr. James C. Courts.

Practical permanence of tenure would be indispensable, and if the services of competent men are to be retained, that would involve adequate compensation. How the office of parliamentary counsel is regarded in England appears from the fact that the first incumbent received a peerage on his retirement.<sup>10</sup> No permanent improvement of the quality of legislation is possible without a staff of experts of high professional standing in that very branch of work. Their experience and authority would in course of time raise greatly, not merely the popular, but, what is just as important, the judicial estimate of the work of the legislature, and questions of construction and constitutionality would be less speculative than they are at present.

3. Intelligent legislation based upon expert advice may be expected in course of time to bring some remedy for the third of the defects that I have mentioned: *lack of principle*. By principle I understand the permanent and non-partisan policy of justice in legislation, the observance of the limits of the attainable, the due proportion of means to ends, and moderation in the exercise of powers which by long experience has been shown to be wise and prudent, though it may be temporarily inconvenient or disappointing in the production of immediate results.

Our constitutional limitations constitute, so far as they go, a most valuable body of principles of legislation, but they are not, and, it may be added, they ought not to be, adequate for that purpose. A rule of law must be rigid and unbending, while at least some principles should be flexible and capable of yielding in an emergency. The attempt to transform such essentially elastic principles of policy as liberty and equality, into rules of law, has undoubtedly enabled the courts to exercise a salutary censorship over immature and ill-considered legislation, but in so far as the courts have sought to enforce them as hard and fast rules, the result has been unfortunate for our jurisprudence. The separation of powers, the non-delegability of legislative powers, the avoidance of special and local legislation, are all according to their nature principles, which under circumstances may be legitimately departed from, and which it may therefore be unwise to set up as absolute rules of law.

Yet we have become so accustomed to rely upon written constitutions for legislative restraint, that we have lost to a considerable degree the habit of voluntary restraint which is politically so much

<sup>10</sup> It may not be amiss to refer to the dignity of the position of reporter of the supreme court of the United States, always filled by a lawyer of distinction.

more valuable.<sup>11</sup> If, as sometimes happens, the courts sanction a measure which verges upon the unconstitutional without quite reaching it, we are apt to conclude that the measure is unobjectionable, confusing what is sustainable with what is right. What has been said of indictments, is not altogether untrue of statutes, the worst are apt to become models because they are most likely to be judicially tested, and, if sustained, to be clothed with the authority of judicial approval.

It would of course be too much to expect that principles not enforced by constitutional sanction should always prevail over considerations of expediency or interest, or even over sentiment, passion or prejudice. But the claims of principle should at least be heard, and for that purpose they should be carefully worked out and formulated.

And this requirement is in a fair way of being fulfilled where the subject of legislation concerns important economic or social interests. One-half of economic and social science deals with principles of legislation. But when it comes to the legal or judicial aspect of legislation, to that part of it which relates to its operation upon technical rights, or to means and methods of execution and enforcement, there is no such body of principles worked out in a scientific manner. Barring the works of Bentham, it would be impossible to point to a book written in the English language discussing in the light of administrative and judicial experience the legal ways and means by which a given legislative policy can best be rendered effective, or the arrangements and institutions which at present serve that end.<sup>12</sup> The reason for this must be found in the large commercial demand for legal work available for the business of litigation, which has absorbed the atten-

<sup>11</sup> The difference between principle and lack of principle is most strikingly illustrated by the different treatment of private or special legislation in England and in this country. In England private bill legislation proceeds with all the safeguards of a judicial proceeding, in this country it became such an abuse that it had to be stopped by constitutional restrictions. Special divorces in England were granted by act of parliament upon well defined grounds and settled procedure, which hardly varied in a hundred years; the legislature of Missouri in 1830 granted a divorce, because it appeared from the petitions of both the parties, that they wished to be separated and that they could not live happily together, and "because the happiness of the people should be the ultimate end and object of all governments." (See *American Jurist*, vol. vi, p. 407.)

<sup>12</sup> A number of very useful and practical suggestions for the drafting of statutes are contained in A. R. Willard, *A Legislative Handbook*, New York and London, 1890, now unfortunately out of print.

tion of jurists to the utter neglect of scholarly or literary service to the no less important business of legislation.

The lawyer's treatment of the law is analytical, the legislator's constructive. To the lawyer, it is a fixed quantity to which he must adjust himself, to the legislator a potential force which he may fashion for his purposes; obviously the two points of view are entirely different. The material that the lawyer needs has been collected and digested with a degree of completeness, that leaves hardly anything to be desired. But while the legal material that the legislator needs, the history of statutes and of their construction by the courts, may also be found, to a considerable extent at least, scattered through the law reports, there is no key to it through digests or treatises adapted for his purposes. The attorneys of special interests alone possess the knowledge that is needed for intelligent legislation, and the public does not always profit by that knowledge.

A share of this work of constructive jurisprudence must fall to the universities. The patient and slowly maturing labors of the student are required to aid the legislative expert who will always have to perform his task under considerable stress. In the past, departments of political science have regarded the work as too technical and legal, the law schools as not sufficiently professional. In consequence it has been unduly neglected. The increasing number and complexity of legislative problems pressing upon the country cannot fail to bring a change of attitude in this respect.

## REMEDIES FOR LEGISLATIVE CONDITIONS

BY DR. CHARLES McCARTHY

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For the last few years the public press and current literature have been full of discussion upon the corruption and inefficiency of our representative bodies, national, State and city.

The student of political science must search deeper than this popular clamor for the cause of the lack of confidence in our legislative bodies.

We are all aware of the stupendous changes in our economic and industrial conditions, which this country has undergone since the Constitution was adopted. To meet these conditions our whole theory of government has been strained. Great administrative bodies and powerful commissions have arisen. The courts have assumed a power never conferred upon them in the original Constitution. The unwritten law of the land has grown with amazing rapidity. But what corresponding changes have been made in the fundamental source of law—the will of the people as expressed through our legislative representatives? Surely no branch should be more affected by changing conditions than the branch whose duty it is primarily to fit our economic conditions to law. Yet a slight examination will convince us that this body has not changed as other bodies have changed. It has not improved, nor has it become flexible with the increasing demands upon it. Science has increased, but the science of law making has remained practically without static development.

Diagram No. 1 may illustrate the problem of modern legislation. Let us assume that this diagram (see next page) illustrates approximately the conditions when the Constitution was first adopted. It will be assumed that the constitutional convention made legislative power and the Constitution conform approximately to the actual industrial and social needs of society. This is a reasonable supposition. If true, what then has since occurred?

Diagram No. 2 illustrates the present relative position of the Constitution, the legislative power, and economic conditions.

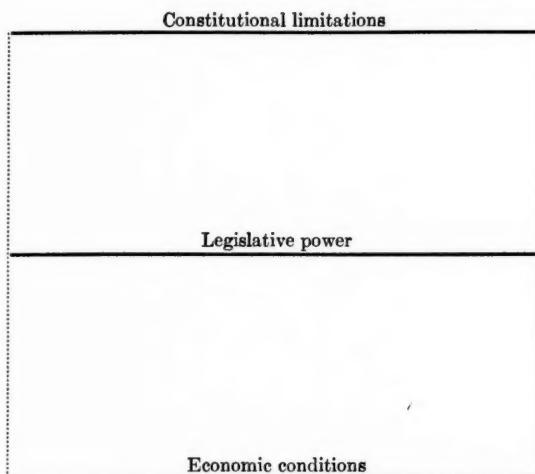


DIAGRAM No. 1.

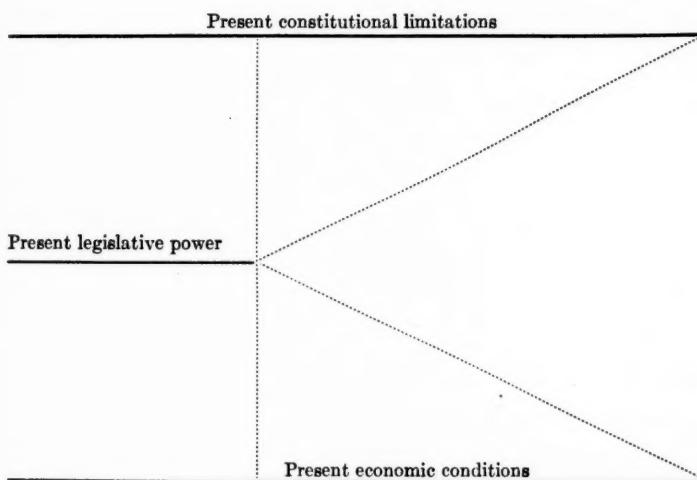


DIAGRAM No. 2.

The constitutional power has been increased by the action of the courts and especially by the new force which has grown up, not contemplated by the original Constitution, namely, the power of the courts to pass upon the constitutionality of laws. The Constitution, in fact, has grown from a small pamphlet into thousands of cases and hundreds of volumes of decisions. These decisions cannot but lessen the power of legislatures. It is true that the "Constitution cannot be read in a law library," and the increase of the domain of the police power and of administrative law has somewhat broadened the power of the legislature in certain directions, but on the other hand the very mass of interpretation is itself a restriction.

Every word, almost, has received an interpretation or has had its meaning confused by endless decisions. A legal authority, Judge Hornblower, in a recent address in which he decried the increase of statute law and defended judge-made law really makes out a case against the excessive power of the courts and at the same time gives us one of the strongest pictures of the difficulties of law making. Says Judge Hornblower:

Experience shows that when rules of law are reduced to statutory form the work of interpretation and construction commences. Each word in the statute assumes importance and calls for enforcement. A "but" or an "and" becomes as important as the subject or the predicate of the sentence, and sometimes even more important. \* \* \* In a statute conciseness, exactness, and precision are sought after, and each article or preposition is as much the will of the legislature and as binding upon the courts as are the nouns and verbs.

Human language is at best defective and ambiguous. Theologians dispute over the meaning of texts of Scripture, and when they have formulated creeds and confessions as setting forth the doctrines of the Scriptures, the dispute begins again over the meaning of the creeds and the confessions. So with statutory law. No matter how clear and simple the language may appear at first sight, doubts will arise, ambiguities will be disclosed, inconsistencies between different sections will present themselves, and a series of never-ending decisions will be inaugurated, construing and interpreting the statute, till each section becomes overlaid with a body of judge-made commentaries forming a new set of precedents and a new jurisprudence. No greater fallacy is indulged in by the advocates of codification than that it will diminish litigation. Statutes breed litigation. Experience demonstrates this. Whatever other merits codifications may have, the diminution of litigation is certainly not one of them. Look at our New York Code of Civil Procedure (our code of practice) with the three bulky volumes of Bliss' Annotations of Decisions construing it, each volume nearly as large as a Webster's Dictionary.

Look at the little Statute of Frauds, composed of a few sections, with its wilderness of authorities interpreting it. Look at the portion of our New York Revised Statutes on Trusts and Powers, and count the cases in each volume of our Court of Appeals Report construing these few sections. The idea that codification is a remedy for uncertainty in the law and that when the law has been written in statutory form, the layman will be able to read and understand it, is a delusion and a snare.

Prof. Howard L. Smith is the authority for the following statement:

There are in America alone over six thousand volumes of decisions of fifty or sixty different tribunals, and these are being added to at the rate of from one to two hundred volumes per annum. The common law is being further developed, illustrated, and made by the courts of Great Britain and all her widespread colonies. The number of volumes of precedents that these add every year to the common law, I have not attempted to compute, but it is certainly appalling. The shelves of our libraries groan under them, and the lawyers are being driven out of their offices by their books.

An advertisement of a recent encyclopedia of law boasts that it has 8559 citations on the subject of adverse possession, while its leading competitor has only a paltry 4999. On the subject of abatement and revival it has 5015 and on appeal and error 47,000. Amid this bog of precedents the lawyer of today must stumble, groping earnestly, but often vainly, for a clue which shall lead him to the truth. It is probable that the number of citations on the one subject of appeal and error in this encyclopedia is greater than the real number of precedents on all legal subjects in existence a century ago; but the mad race of precedents is only begun, and will of course increase in the future in an ascending ratio, until in the near future they will be counted by the tens and the hundreds of thousands or millions.

That the lawyer desiring to advise his client as to some simple, readily foreseeable question of law should be obliged to consult hundreds of volumes, and thousands of precedents, perhaps only at the end to find that there is a hopeless division of authority, and that he knew just as much about it in the beginning as at the end, is certainly a situation so serious as to demand some remedy, if any be possible.

If the lawyer has to meet these conditions what can the layman do? If these conditions are met with in the interpretation of law then the making of the law is indeed a terrible task. We have an endless circle. We cannot make statute law without consulting this labyrinth, but nevertheless we *must* make it. We *must* make it, even if we but follow public sentiment.

"There is a diffused desire in a civilized community" says Walter Bagehot, "for an adjusting legislation; for a legislation which should adapt the inherited laws to the new wants of a world which now changes every day."

Our government was founded on the principle that this adaptation should be made by the will of the people expressed in legislation. We cannot turn our task over to the judges. We did not make our government on that basis. Divided courts and reversals have left the lawyer as well as the layman of the legislature, helpless. The courts have often indulged in reckless use of the power to declare laws unconstitutional on the slightest technicalities. The fourteenth amendment to the Federal Constitution has been very efficacious in restricting State legislation as has also the broad interpretation of federal statutes by the federal courts. On the other hand the simple industrial conditions of a hundred years ago, or of fifty years ago, have given place to the present era of wonderful inventions. Nearly every invention as well as nearly every device, economic, commercial, and mechanical, used in our modern life, has to be met by legislative restriction or control.

It will be seen then at a glance that law making has met great difficulties in the increased activity of the courts, and in the increased intricacy of all things composing or affecting our modern civilization. It is not only harder to make laws, which are legally and technically correct, but it is indeed an immense task, to make laws to fit conditions of today.

Under these conditions it is indeed remarkable what progress has been made with our statute law. In spite of all criticism and faults when one looks over our statute law he is amazed that it is so good. When he considers that it was made under the conditions herein described; when he considers that State after State came into the Union, each making an entirely new constitution, each adopting an entirely new body of laws, he cannot but feel proud of the inherent ability of the American people. The argument is unanswerable. Our legislators have not been corrupt, nor have they been inefficient. Our statute volumes are monuments to the ability and common sense of our legislators. No other people under the same conditions could have done so well.

But what remedies must be adopted if representative government is to continue to exist?

One of the remedies which has been proposed today is that of commission government. We have had a frenzy in America in the last two years for commission government. We seem to believe that we have found a cure-all. We have tried to delegate to certain individuals power to do things which the legislature could not do well.

The result is that government by commission or delegated legislation has been growing at an alarming pace. There is no doubt that a small body of men can do work that a large body of men can not do. We are all familiar with the fact that a large convention cannot do the work of a committee or a subcommittee, but nevertheless we must agree that the large convention is on the whole a safer thing than the small committee or the subcommittee. There is much that is good and efficient in commission government, but the indiscriminate delegation of powers is nevertheless a dangerous tendency. We are all familiar with the growth of hateful bureau government in Europe. Such conditions would not be tolerated in America. The increase of commission government is a tendency which, carried to extreme, is fraught with danger to democracy. Power is given to commissions and their acts are not brought out in the white light of public opinion. It is a notorious fact that commissions tend to go to sleep and I believe that it can be easily proven that government by political commissions has so far in America not been a great success.

In the old country it is a makeshift encouraged to a great extent by the strictly centralized governments and the monarchy. Arbitrary power such as that possessed by administrators in Europe is foreign to our conception of government and hateful to us. We are familiar in America with the political appointees who are given such great powers by these commissions. There are notable exceptions, and great efficiency has often developed, but on the whole this tendency may be considered dangerous. The most that can be said for the system is that it is often an expedient for making laws effective and in so far it is an aid to representative government because it carries out and enforces the will of the people. This compensates in a degree for its dangerous features—concentration of power, and delegation of legislation. It, however, is not a fundamental remedy. It cannot help in the making of the laws, but only in the enforcement of them.

The great demand for constitutional conventions is another indication of the same thing. Behind the idea of making the constitution conform to the times the idea is that the constitution should embody all that has been gained by previous years of struggle so that it can not be tampered with by the legislature. The new constitutions with their vast and elaborate machinery are indeed examples of the distrust of our legislators by the people. Our constitutions have been purposely overloaded, because the people who made these constitutions wished to put certain things in them which could not be over-

turned by the caprice or corruption of legislators. This is shown by the fact that every constitutional convention has added in express language many limitations on the power of legislators. Constitutional conventions often defeat their own purposes and effectually check the progress of legislation and the molding of legislation to economic conditions.

Many advocates of codification and especially lawyers who have made but a superficial examination of the history of law making in England and America will doubtless regard this feature as a remedy rather than something to be criticised. Actual practice has shown us that it is impossible in our government to codify and then prevent amendment. The convenience of lawyers and the certainty of law principles must be sacrificed to the will of the people. Constant amendment is inherent in the American and English systems. Any other concept is based upon *a priori* idealism. A codification which would exist unchanged is impracticable and impossible. Under our system the best laws come from the constant amendment of many sessions. The modern State constitutions containing detailed and fully completed laws prevent that change of detail so necessary to the proper making of good laws.

The insertion of a corporation commission law into the constitution, as was done in the Virginia constitution, does insure its permanency, but it does insure also the permanency of errors, inaccuracies and old fashioned principles. The distrust of our legislatures and the distrust of the people implied in these gigantic compilations has often been the means of added inefficiency in legislative action and the consequence has been useless litigation. A broadening of the interpretation of the courts is often sought, but the only result attained is often unsettled limitations on statutory enactment, law and more litigation. They are indicative of the grave distrust in which our law making bodies are held and nothing else. They sometimes do not help good legislation to any great extent, nor add to the solution of the problem in any great degree. They often form, indeed, barriers to legitimate and well founded progress of public opinion when they should be the true means of changing outworn doctrines and of making them conform to modern thought.

It is very significant that many of the most advanced States in matter of legislation are still working under old constitutions, amended with care from time to time after patient consideration.

The concentration of power in the national government is another

indication of the lack of confidence which the people have in the efficiency of the State governments and of State legislators, and is another desperate remedy advocated strenuously in the last six years.

There is a widespread agitation for centralization and nationalization—a movement which strives to have one after another of the State functions taken over by the national government. We hear agitation about federal life insurance, we hear agitation about national incorporation acts, federal foods acts, child labor acts, and various forms of federal supervision of one thing or another.

Speaker Cannon in a recent speech before the Union League Club, of Philadelphia, said:

In my judgment the danger now to us is not the weakening of the federal government, but rather the failure of the forty-five sovereign States to exercise, respectively, their functions, their jurisdiction touching all matters not granted to the federal government. This danger does not come from the desire of the federal government to grasp power not conferred by the Constitution, but rather from the desire of the citizens of the respective States to cast upon the federal government the responsibility and duty that they should perform. If the federal government continues to centralize, we shall soon find that we have a vast bureaucratic government, which will prove inefficient if not corrupt.

Mr. Bryce in writing twenty years ago, comments upon the wide extent of State power compared with that of the federal government.

Said Mr. Bryce:

An American may, through a long life, never be reminded of the federal government except when he votes at presidential and congressional elections, lodges a complaint against the postoffice, and opens his trunk for a custom house officer on the pier at New York when he returns from a tour of Europe. His direct taxes are paid to officials acting under State laws. The State or a local authority constituted by State statutes, registers his birth, appoints his guardian, pays for his schooling, gives him a share in the estate of his father deceased, licenses him when he enters a trade (if it be one needing a license), marries him, divorces him, entertains civil actions against him, declares him a bankrupt, hangs him for murder. The police that guard his house, the local boards which look after the poor, control highways, impose water rates, manage schools—all these derive their legal powers from his State alone. Looking at this immense compass of State functions, Jefferson would seem to have been not far wrong when he said that the federal government was nothing more than the American department of foreign affairs.

What a change has come over us since that was written. Surely we cannot but view with alarm the further encroachment into this splendid field of local self-government. It is a fact that economic conditions have bound the country more firmly and closely together than formerly, and that centralization has taken place in commerce and industry, but that is no excuse for killing our original concept of government. The local units have themselves greater problems of purely local import, which can be met properly only by leaving to them the power to work out their own salvation.

Surely a system which takes away from the control of the people the things which are nearest to them is no remedy for democratic evils. If public opinion is sluggish in the States of America now, how will it be when everything is concentrated in Washington? Again, what guarantee have we that the legislation in Washington will be more effective than it is at present? Are the federal banking laws as effective as those of New York or Massachusetts? Is the interstate commerce commission act as effective or strong as the Wisconsin railroad commission law within its limitations?

It may be true that a few federal laws may be stronger and better than those in the more backward States, but a federal law must be as all federal laws have been; a matter of compromise. In the end the most forward States will have to wait for the most backward. If the people of Massachusetts want a better child labor law than that the national government can provide, how are they going to get it under this system? Which law will be obeyed? Judge Amidon has already pointed out in an able manner that one or the other will survive. Which will be effectively enforced? Will not the courts inevitably tend to enforce the federal law? Has not this been the universal rule of history?

The evils of our government have resulted to a large extent from sluggish public opinion. It is a great task to arouse, direct and keep awake public opinion in even a small district. What will become of us if we have to arouse and keep awake the fires of public opinion in an entire nation? The dangerous powers of the mighty engines of commerce have grown while a generous government distributed with a lavish hand the gifts of nature. Power and concentration grew because the people were content and could not be warned or aroused and were satisfied with a careless *laissez faire* philosophy of state. How can we hope to remedy the condition by centralization? It means the enervation and stifling of whatever healthy local public

opinion we still have. We forget that the people of the States were awake long before congress dared to act upon these evils. Public opinion had been aroused in the States on railroad legislation, food legislation, and the control of corporations and a hundred other vital subjects long before a national public opinion could be formed.

Granger legislation may have been crude and costly, but it certainly was a great education to the people and invaluable help to national legislation. Those who point with pride to what the national laws have accomplished forget that the foundation of those laws lay in the agitation in the States—a movement in which the State of Wisconsin took no small part. There would have been none of the federal legislation today if the States had not had a degree of power to work out these problems before the nation took them up.

Centralization is an anti-democratic movement in its essence. It takes from the people of the different States their power and bestows it in the hands of two or three men with a vast army of subordinates appointed from Washington. Such a system cannot fit laws to the peculiar needs of our communities. Indeed it cannot better our laws in any way. When one thinks of the 10,000 to 20,000 bills introduced at each session of congress what will become of our legislation if congress takes over even more of the power of the State legislatures, and proceeds to regulate every action properly belonging to local bodies?

Surely we cannot look for good legislation from this chaotic mass, and from experience we are not at all sure of the effective administration of such laws. We are not at all sure that, as Representative McCall says, we agree with the

Assumption that the evils now existing in life will all disappear if we shall enter upon a Utopian world, where every breath we draw will be under the direction of some beneficent instrument of the Washington deity.

Far safer is the doctrine that the nearer the people are to the laws which the people make the better are the laws.

There is much truth in the recent saying of the attorney-general of Massachusetts, that

The wisdom, discretion and honesty composite in fifty States and territories are more to be valued than the excellencies of one person appointed at Washington. State supervision is good or bad, according to the merits of the best of the commissioners. Federal supervision must be good or bad, according to the qualities of one man who is unchecked by the work of coördinate officers.

There is no improvement to be accomplished by turning over the legislation for the vast economic things with which we have to deal in our States to the already overcrowded congress at Washington, with its already omnipotent speaker and despotic committees, or to delegate authority of irresponsible bureaucratic commissions there.

If congress is unable to make a tariff which will fit the varying conditions of this vast country, how then can we trust congress to make laws on all subjects which will fit the economic conditions of fifty widespread States of diversified industries and varied climatic conditions?

It is often said that the courts will remedy the inequalities and mistakes of our legislative bodies and that also they will interpret the acts to suit the conditions of the times. It has even been suggested that the courts interpret and pass upon bills before they become laws. It has been pointed out with much truth that the courts are influenced to a certain extent by public opinion and that their decisions are based more and more upon sociological motives rather than upon pure common law principles. The broad interpretation advocated by Judge Chas. F. Amidon and others and the increased importance of the police power in recent decisions is pointed out as indicative of the fact that the courts will eventually fit the laws to economic and social conditions.

It may be said that the courts may interpret the law and by one subterfuge or other express the will of the people by twisting the Constitution to meet that will. But is it not the same process which has been going on? Is it not giving the courts both legislative as well as judicial power of increasing the strength which they have already usurped? Safer by far for us to follow the original limitations on the power of the judiciary as laid down by Prof. James B. Thayer of Harvard:

Where the power of the judiciary did have place, its whole scope was this; namely, to determine, for the mere purpose of deciding a litigated question properly submitted to the court, whether a particular disputed exercise of power was forbidden by the Constitution. In doing this the court was so to discharge its office as not to deprive another department of any of its proper power, or to limit it in the proper range of its discretion. Not merely, then, do these questions, when presenting themselves in the courts for judicial action, call for a peculiarly large method in the treatment of them, but especially they require an allowance to be made by the judges for the vast and not definable range of legislative power and choice, for that wide

margin of considerations which address themselves only to the practical judgment of a legislative body. Within that margin, as among all these legislative considerations, the constitutional law-makers must be allowed a free foot. In so far as legislative choice, ranging here unfettered, may select one form of action or another, the judges must not interfere, since their question is a naked judicial one.

Nothing is more certain than the fact that if in the future courts interpret and legislate at the same time, in time the people will take a hand and control them. Such a condition would breed discontent and anarchy. Such a condition would be disastrous and it is obviously the interest of the courts that legislation be based upon right principles, technically correct and of a scientific character before the courts pass upon it. This will mean the preservation of the true dignity and power of the courts. Our system will be preserved. The increased powers of the courts under present conditions is a menace to democracy and representative government as well as to the courts. Wisely our ancestors followed the maxim that "there is no liberty if the judiciary be not separated from the legislative and executive." The great menace to the judiciary at present is that an impatient people will tear away its power with no gentle hands. The impatience at decisions based upon technicalities such as the recent decision on the Illinois primary election law is not a good thing for the courts and not a good thing for democracy.

The courts cannot furnish, if they wish, a remedy. Already their tribunals are crowded with the misfit legislation, the product of unscientific methods in trying to fit economic conditions and law to popular will. Says the Montana Bar Association in a recent report:

The time of the court is consumed in hearing discussions upon statutory enactments and determining what law is in force and what has been repealed. Litigation is thus delayed, additional expense engendered and private rights rendered insecure.

Our State legislature is the place for statute law to be made and not in the courts. If our State legislature gains in the confidence of the people, so will our supreme court and our judicial bodies gain in the confidence of the people. Our courts will not be called upon to make decisions which apparently defeat time and time again the will of the people. They will not be called upon to turn down law after law which has been put upon our statute books often by prolonged and patient struggle. The laws will be better before they come to the courts. Prevention is better than cure, and every effort we can

put into prevention in this case will make our laws better and will make it easier for our courts to decide upon the true merits of the laws. Decisions based upon technicalities will be less in number. Our judiciary will continue to be respected and honored. We have no hope for the betterment of legislation by continuing the present system of allowing the courts to go further and allow them to interpret bills before they become laws. Such a system would be disastrous and would lead ultimately to anarchy.

I do not mean (to quote Judge Amidon) that our Constitution should become "a kind of legal Calvinism, logically perfect, perhaps, but wholly unfit for life;" and indeed I believe that a reasonable broadening of our Constitution is absolutely necessary for the betterment of legislation. I agree again with Judge Amidon that constitutions "ought always to respond to the deep organic changes in the national life," but do not believe that our Constitution is an English constitution. I am one of those who believe in its fundamental conception with reasonable modifications to fit present conditions.

Our State constitutions, at least, are yet open to amendment and if the same is not true of our Federal Constitution yet our State courts should not follow blindly any theory relating to the national Constitution. Amendment by the people and not interpretation by the courts is far preferable in bringing about the results sought for. Our courts must not legislate.

Another remedy which we have heard much about is laws restricting campaign contributions and the laws restricting lobbying. These are merely the attempts to remedy the matter without going to the fundamentals that have so far only served to place a stigma upon certain acts. They have not been effective and have been openly disregarded. Very few prosecutions, if any, have taken place under these acts. The lobby laws are wrong in conception. They restrict the fundamental right to see that our representatives should represent us. They are directed merely against certain individuals while other individuals are openly given immunity. They are after all insulting to the integrity of the American legislature. We have found it necessary to try to restrict lobbying for the simple reason that we have found that logic and persuasion will win if given an opportunity. Great corporations have hired lobbyists, not merely for the purpose of bribing, but also for the purpose of persuading and influencing legislators. The lobbying laws are sometimes so sweeping that if an American citizen wishes his representative to represent him in

a certain manner, he is forbidden to do so. The corrupt practice laws have so far never been enforced to any great extent. These remedies are make-shifts. Their strength lies in the public sentiment and vigilance which they arouse and the stigma which they fix upon corruption.

A movement similar to these movements is that of the people's lobby. The idea is that if the corporations maintain a lobby the people shall maintain an organized lobby. But who are the people? What subjects shall this organization lobby for? What subject shall they lobby against? Who is to be the censor for the legislature? The theory is good but the execution is difficult. The people's lobby, the voters' league and other institutions of this sort do a great work, but the work is upon public opinion and not upon legislative opinion. They act as alarm bells. They keep public opinion awake. They throw the white light upon the source. They have become a necessity in our representative government because our prosperity has made us complacent. We can not be too watchful in a republic. These machines are necessary to take the place of agitators or leaders to arouse public opinion. They keep alive interest. They advertise. They are fighting bodies, critical rather than constructive. They are partisan in their nature. They are not judicial. From their very nature they do not furnish that impartial help which the legislator needs to aid him in his complicated duties.

The desperation and dissatisfaction with which the public in general views our legislature and the legislative bodies is shown most strikingly in the growth of the referendum, the initiative and the recall. It is felt that representative government is a failure and that the people alone can be trusted—that the people must have a check upon everything done by their representatives. The other remedies proposed and described in this article are in their nature distrustful of democracy. These last are democratic in tendency. Their efficacy and practicability are yet to be tested. They are helpful if only to arouse public opinion and to educate citizens, but their practicability in building up a strong harmonious body of statute law can, from the very nature of these expedients, be doubted. They cannot avoid cumbrousness. They cannot take the place of representative bodies however much they may add to their honesty or efficiency. Deep questions of constitutional policy and of constitutional law are difficult to discuss and present properly before the people in this manner. These movements certainly reflect public opinion, but do

they reflect public opinion scientifically in the best kind of statute law? The submission of woefully inefficient fragmentary and sometimes unconstitutional legislation in this country by the referendum is answer to this question.

We have no means of improving statute law by this method. It is haphazard at the best, and sometimes even worse. It is sometimes a means by which legislators escape just responsibility upon a proposition by accepting the alternative of "leaving it to the people."

Conceding that the legislator is able and honest, conceding that many of the proposed remedies here mentioned will be to a degree efficacious; what remedy can be proposed which will meet the circumstance squarely and help to build up our statute law?

Let us suppose that the supreme court of the United States was deprived for one instant of all cases, precedents and the body of jurisprudence, which has been built up and classified for ages. What would result? Would not chaos reign? Would not the efficiency of our judiciary be greatly diminished? Yet the striking thing is that the man who makes the law, who fits it to economic conditions, has no such body of guiding principles to help him. His task is ten-fold more difficult than that of the judge.

This will seem strange to the lawyer who will immediately say, "but he has the decisions of the courts." So he has, but they do him little good. They give us the limitation but often no positive guidance. Let the man who wishes a perfect State law regulating the issue of stocks and bonds of corporations try to draft a law if he wishes to learn what positive principles, legal or economic, he can sift out from the mass of legal decisions which he must consult.

Let the legislator try to make a law regulating rebates and he will find at once that the kinds of economic rebates may be many times greater than will fit any definition of the courts. It is then necessary to have this economic data as well as the legal data and then we must profit by the experience of others and find out how these laws work. This is no small task. It is a far greater problem than the one of building up a law library or gathering jurisprudence of the past.

Prof. Ernst Freund in a recent pamphlet upon Legislation and Jurisprudence says:

What does it mean, to say that the fundamental law secures a certain amount of liberty, if it is not said how much, or that it forbids unjust discrimination, if the injustice is not defined? It is the merest commonplace that some restraint of liberty of contract and business,

some discrimination, is not merely valid, but essential to the interests of society. Can the fundamental law be satisfied with the proclamation of rights of absolutely indeterminate content, directly contrary to other recognized principles, or is not limitation and definition of some sort absolutely essential to an intelligible rule of law? The courts have given us criticism, denunciation, and condemnation, but no positive guidance. The course of adjudication is marked by divided jurisdictions and divided courts, resulting in a lamentable uncertainty as to the limits of legislative power.

What is needed is a body of jurisprudence or quasi jurisprudence beneath the making of the law. The judge goes into the law library and finds the classified law and jurisprudence of the past, the legislator comes for a few months every year to make laws with no such data at his command.

But how can such a body of data be gathered and classified—of what does it consist?

The mass of data represented by 1, 2, 3, 4, 5, the judge uses in the interpretation of law. The mass of data represented by 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, the legislator uses in the making of law. He must not only use what the judge uses, but he must get at the facts, sociological and critical.

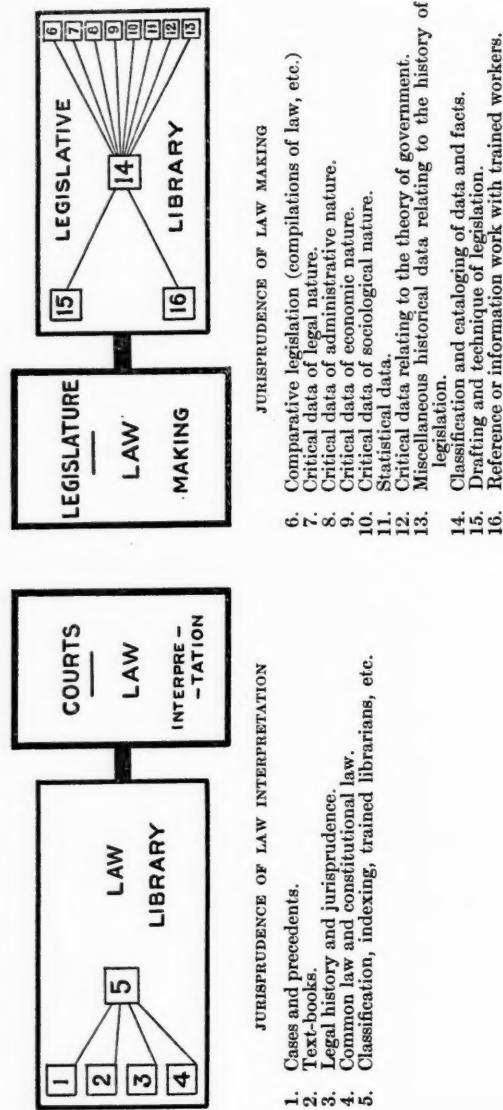
The legislation throughout the world, the model laws, the cases which interpret them, the opinions of administrative officers, the investigation of economists, and the statistics of the actual working of laws—a collection of this data is absolutely necessary and especially so today, when economic conditions are so constantly shifting and changing.

Of course the above diagram does not tell the whole story. A law is made not by the courts or by the legislature or still less by administrative bodies. It is made by all of these forces. It is good in proportion as these bodies are efficient and good as their procedure is just and rapid.

However strong a statute may be, if its enforcement is subject to tedious delay caused by outworn procedure, then the law—I mean the law in the abstract,—is not as efficient.

If a statute fails of enforcement because of the inefficiency of corrupt administrators then again so much is taken from our law.

At the risk of confusing the thought in this paper I wish to submit the following diagram and do this in order to assure my hearers that I am not laying undue stress upon statute law but that I recog-



nize that there must be harmony and efficiency in all branches of the law if it is to be good.

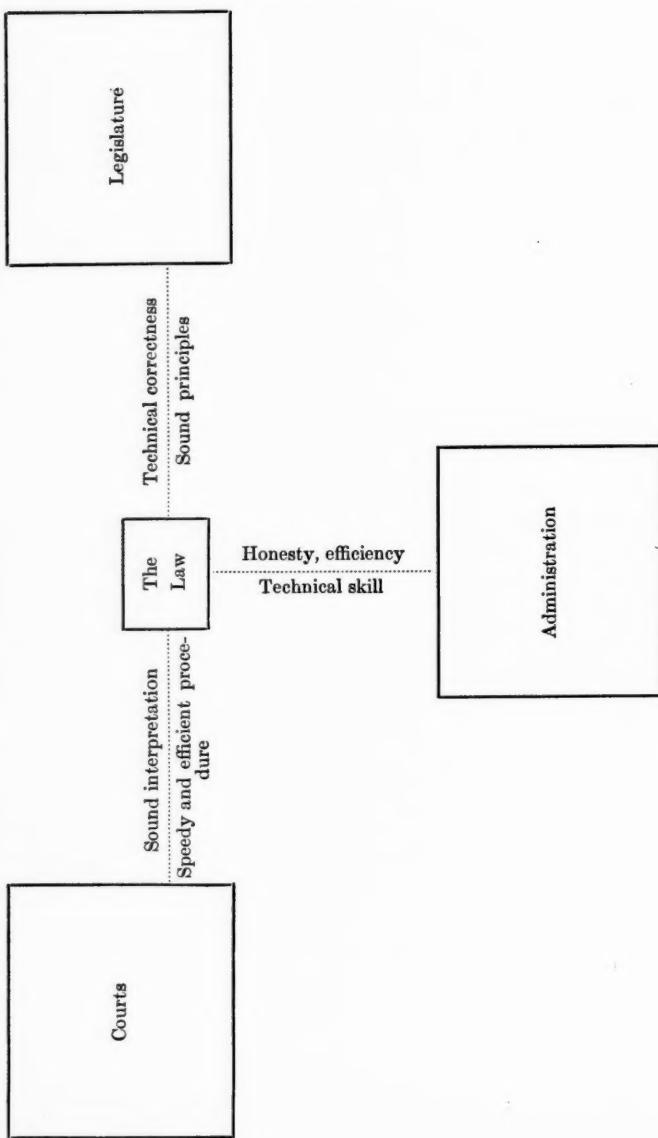
I have dwelt upon and emphasized the field of legislative law making merely because it is the field in which the least has been done.

The possibility of a jurisprudence of law making has been realized, but by few people. Even in England, where an official draftsman is employed, practically nothing has been done to gather the history of statutory enactment.

Says Prof. Ernst Freund in his article upon Legislation and Jurisprudence:

For the vast majority of the acts on the statute books of our States, the reasons or considerations inducing their adoption have not been formulated. There has often been no discussion in the legislature whatever, or if there has been, only incomplete accounts of the debates have been preserved in the daily press. It is otherwise with regard to the more important legislation of congress and, in a number of States, with regard to the enactment of constitutions. In some branches of administrative legislation there are comments and recommendations of official authorities, and revisers' notes furnish for a few States valuable material. The whole amount of this source material is poor as compared with what the official publications of England, France and Germany afford. A great amount of information for legislative history is scattered through the law reports, in cases construing statutes and pointing out defects, which led to appropriate amendments. But the current digests pay no particular attention to this feature of the law reports, and the information is therefore not in a readily available form and has not to any considerable extent been utilized.

As for the history of operation of statutes, there has never been any systematic observation of the working of the laws of persons, property, or contracts. Excepting the subjects of bankruptcy, divorce, and to some extent of personal injuries, there are no civil judicial statistics, still less, of course, any information regarding the legal relations that do not reach the courts. In codifying the German civil code, use was made of data collected by the government regarding the prevalence of certain forms of marital contracts and testamentary dispositions; nothing of this kind would be available in the United States. The census bureau in Washington would be the only organization in this country to gather information of this kind, and there is no present prospect of its undertaking so far-reaching and difficult a work. Nor is there any near prospect that our States will undertake the collection of judicial statistics. General impressions instead of exact and systematic observations will, for a long time to come, be the basis upon which the policy of our civil legislation will be built, and there is no promise of any radical advance of jurisprudence in this respect.



With regard to revenue and police legislation, however, the outlook is much more hopeful. A considerable amount of information is even now available in the official reports of the authorities charged with the administration of the various acts, which naturally deal to a considerable extent with the administrative and judicial aspects of legislation. With the multiplication of controlling and regulating boards, more and more light will be thrown upon the operation of principles of constitutional and administrative law.

All this material ought to be collated and digested in the same manner as is now done with judicial decisions, and the result should be the construction of a body of principles of legislation to supplement the existing body of principles of law. Both in its material and in its method this branch of legal science must differ considerably from the judicial jurisprudence with which we are most familiar; but it is a department of our science equally legitimate and valuable, and destined to grow in importance with the increasing legislative activity of the modern State.

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Exhaustive inquiry into the conditions to be regulated, impartial consideration of all interests concerned, and skilled and careful draftsmanship are equally indispensable requirements to produce legislation that is to avoid both inefficiency and injustice. In England, France and Germany the observance of these conditions is made possible by the fact that the respective governments introduce all important bills, that they have the greatest facilities for ascertaining the facts underlying the proposed measure, and that they command the services of highly qualified officials acting as draftsmen. These conditions cannot be easily reproduced in a country in which the government has no initiative in legislation, and in which it is often very difficult to place the responsibility for the framing and the introduction of a measure. In recent years a few States have made provision for officials who are to aid in the drafting of bills, and for the systematic collection of information regarding legislation and legislative problems, and a great deal of valuable statistical work is done by official bureaus in the States and in Washington. It is to be hoped that these efforts in the direction of improving and harmonizing methods of legislation will, in the near future, be further extended and especially that they will receive the active support of legislative bodies.

Besides the data which Professor Freund mentions there is also a large body of material which can be gathered and should be gathered and indexed and classified. The expedients which are put into laws to make them effective, the decisions and rules of administrative commissions, and the decisions of attorney-generals, bar associations, reports upon codification, model laws or uniform laws—all this data

if made available would aid the legislator in his task. Such material will help him to find out what he *can* do.

The classification of this data is a great task, but should be begun by somebody. If the legislator has at hand this data and can make use of it as the judge makes use of the law library, then we can hope for better legislation. If the legislator has also at hand skilled draftsmen, his task is made easy. With the clerical help of such a skilled man at his command he can hope to represent his constituents more efficiently.

For those who decry the importance of statute law, let me call attention to the fact that statute law in its substance at least springs from the same source as common law—from the customs and sanctions of society. In fact modern statute law is nothing else after all than common law. If this is so then we have still another justification for a department of this sort, another justification of the collection of data which will allow the legislator to study the formation of public opinion in order that he may fit this written law to this body of common law.

If common law meant speedy and certain justice then those who profess to revere common law must look upon a statute creating an efficient railroad commission as indeed the rehabilitation of the common law. If this is so, surely then the scientific data which can be gathered relating to railroad commissions will be of the greatest service to our legislators and to our courts in the formulation of "modern common law" if I may use that term and in the fitting to modern conditions of those ancient principles which we have been taught to revere and which we have been taught to believe are the bulwark and foundation of our liberty and justice.

Prof. Roscoe Pound in a recent article upon sociological jurisprudence, says of the teacher of law that he "should be a student of sociology, economics and politics as well." He should know not only what the courts decided and the principles by which they decide, but quite as much the circumstances and conditions, social and economic, to which these principles are to be applied; he should know the state of popular thought and feeling which makes the environment in which the principles must operate in practice. This is true of our ideal legislator. If we cannot get such men we at least can give our legislators the help of such trained men and the classified data with which to work.

We look upon the collection and classification of this data as merely

a common-sense business operation. No one would buy land in Texas without ever having seen that land. You might buy land in a lake or in the bed of a river, if you should use such a process as that. You would at least get some one to look up your title. But we leave our legislators to copy a Texas statute that may be twenty years of age, may have been modified twenty-five times, may be entirely unsuited to our conditions, and which may be in the end unconstitutional—we let our legislators incorporate such statutes in our statute books without a protest from the public. It seems merely common sense that we should get all possible knowledge relating to that statute for the use of our legislators. In this way legislation cannot help being bettered; in this way the dearly bought experience of one State is used for the betterment of conditions in another State. In this way the best there is can be culled out from the statutes throughout the country and used for the benefit of our people.

Combine this work with simple rules calling for scientific methods, greater publicity in our committee system, and greater public responsibility of our committee men; establish the custom of appointing investigating committees and special between-session committees and better legislation will result. We have recently seen the work of the Armstrong investigating committee in New York. No insurance law ever passed in this country was so strong as the Armstrong report, or had so much effect upon insurance regulation in this country as the Armstrong report. That report was made by legislators and not by State officials.

Boards have been created licensing barbers, and licensing every trade and occupation. We object to the increase of commission government, and yet commission government has increased because it has been felt for some time that the only way of enforcing laws, the only way of doing special duties, was to do them by the creation of new boards. And yet this Armstrong committee shows us a way of making laws and enforcing laws, which is better than boards and commissions. If we have some department working with our legislature, and have that department also work outside of the sessions with investigating committees, then we can be sure that there is always a check upon the actions of our boards and commissions and that there is always at hand a remedy for evil in the hands of the people. We can always ask for an investigating committee, and the report of that committee will generally result in good, sound law.

Trained technical workers, whose time will be devoted entirely

to statute law improvement, with some continuous department for this work—a department which will be the instrument of the legislature in making effective, in the most scientific manner, the will of the people, will soon solve in a simple and easy way many of the problems which now seem so desperate.

This plan here presented, although crude, is at least healthy. It aims for a return to democracy and to local self-government. It aims to put into the hands of the legislators the power that properly belongs to them and which they are losing.

It is to the State legislators after all, the representatives of the people, that we must look for safety to the republic and not to the courts or to commission government.

For six years we have been trying to solve this problem by means of the Wisconsin legislative reference department. That department is the creation of the Wisconsin legislature and has been based upon the theory herein presented and has been described elsewhere, and I shall not go into it here. Suffice to say that we are working at the problem and have accomplished a little—a very little. We have built the skeleton only. We have now three draftsmen working at the problem and about fifteen other people in various capacities.

Scholars from all over the world have commented upon the work and our legislators have enthusiastically supported it.

We have not a cure-all, any more so than codification or any other single proposed remedy is a cure-all. We have, however, an aid to clearness and an aid to science. It cannot take the place of the courts or of judge-made law but no one can deny that such a system would help the jurist and help the judge-made law to become scientific.

Many departments based upon our ideal have come into being in different States and cities. Still after all we have nothing but an ideal and a skeleton. We have merely done something in a field where nothing was done.

## REVISION OF STATUTE LAW

### ABSTRACT OF REMARKS OF CLARENCE B. LESTER, LEGISLATIVE REFERENCE LIBRARIAN, INDIANA STATE LIBRARY

Senator Whitehead noted the need of *time* for careful consideration in statutory revision and explained some of the legislative conditions arising from that fact. The State of Indiana, with a limited session of only sixty-one days and the severe nervous strain under which assemblymen must work to carry out the *absolutely necessary* legislation, illustrates the effect of constitutional handicaps in respect to this time element. Mr. Sanborn in his paper presented the plan of revision by subjects. This would lead me back to the necessity for recognizing and classifying the subjects of statutory law, so fully brought out by Dr. McCarthy. The field of statute law is not adequately provided for in the classification of the law libraries based upon the whole wide sweep of case law, nor in that of the State libraries, for instance, based upon provision for all subjects in printed literature. Just as our legislative halls in Indiana are geographically between these two depositories of the knowledge needed by the legislators, so a properly balanced scheme of classification for statute law is somewhere between these two recognized plans. The recognition and statement of a basis of *distinct principles* for statute law seems a prerequisite for any feasible plan of revision of such statute law by unitary subjects.

## INTELLIGENT LEGISLATION

FRANK M. HOYT

The observations which I have to offer are not those of a student of political science, but of a practicing lawyer, whose duties occasionally bring him before committees of the legislature and whose calling gives him opportunity to notice the practical working of legislative acts.

I fear that before this audience I shall appear in the character of Molière's Bourgeois Gentil homme—announcing discoveries of facts astonishing only to myself, and engaged in the somewhat useless task of "carrying coals to Newcastle."

I shall confine myself to the consideration of State, as distinguished from national legislation.

As a preface, I call your attention to certain familiar propositions.

The law which governs us is to be found in the constitutions of the United States and of the States, treaties made by authority of the United States, the statutes enacted by the national and State legislatures and the common law.

The common law is the expression of those rules of conduct, which, after long experience, have been found by the courts, to be just in the greatest number of cases. Its principles are readily adaptable to the vast majority of new judicial problems arising from changed conditions and, with exceptions much more rare than legislators imagine, it is safe to allow the courts to work out relief under, and in harmony with, its well established doctrines.

Our well being depends upon respect for, and strict observance of, the law.

To secure respect for the law, its provisions must be clear and promotive of justice.

To secure observance of the law, its rules must be known to those who are asked to obey them, and not run counter to general habit and custom.

Stability in the law is of prime importance, because by and through lapse of time, knowledge of its provisions grows and that which is of doubtful meaning is made clear by judicial construction.

Each change in the law requires time to make it known—destroys in a measure the certainty established by the decisions—renders fur-

ther consideration by the courts essential before the precise meaning of the words working the modification is ascertained.

It is rarely necessary to change the law, except to provide a remedy for a wrong for which the existing law gives inadequate relief. The act working the change should be carefully phrased so as to comply with constitutional limitations, and restrict relief to the exact evil aimed at. Unless these requirements are studiously observed, confusion and uncertainty must result.

Every change of the law, however reluctantly or carefully made, affects the whole system. Hence, the advice given by Montesquieu, quoted by Judge Parker in his recent address on *The Congestion of the Law*:

It is sometimes necessary to change certain laws, but the case is rare, and when it occurs, one should touch them only with a trembling hand.

Instead of following this wise suggestion, our legislators run to the other extreme.

Judge Parker states that each year 25,000 pages are added to our statute books, and calls attention to the fact that

during the years 1899 to 1905 the English parliament, legislating for the needs of 42,000,000 of home population and millions of dependents, passed on an average only 46 general and 246 special laws, the number of the latter being swollen by the necessity of granting franchises for railways and charter amendments for cities.

These were flood years of English legislation arising from the growing tendency to paternalism.

In the same years, the legislature of the State of Wisconsin, sitting in biennial sessions, enacted 1801 laws, or an average of 450 laws a session. This was in the period immediately following a revision of the statutes (1898).

In the session of 1907, 676 laws were passed.

That laws passed in such numbers and in such haste by bodies of men, the great majority of whom are of limited legislative experience and ability, are crude is only a necessary logical consequence. Many are inoperative, as, for instance, that provision in chapter 469 of the Wisconsin laws of 1907, requiring, under a penalty of fine or imprisonment, each physician in the State to register in an office, which by the terms of the act did not come into existence until after the time limited for such registration had passed.

Many are useless, as, for instance, the statute, now common to most of the States, which requires purely private corporations, under penalty of forfeiture of their charters, to make annual reports to the State of their assets and liabilities, property, amount of business done, etc. In the affairs of these corporations—by which the business of the country is largely done, and which are formed purely as a matter of convenience and to limit liability to the capital invested—the public has no more interest than it has in the affairs of an individual trader. The only parties concerned are stockholders and creditors. Any stockholder at any time may demand an investigation of the corporation's books and affairs, and if the request be refused, the courts in a summary proceeding will open them to him. A prospective creditor can demand of a corporation as of an individual a statement of its affairs as a condition precedent to giving credit, and an actual creditor has ample remedy for the collection of his claim by suit, attachment, execution and winding up proceedings. The reports filed in the office of the secretary of state slumber undisturbed, since no one has occasion to consult them.

Laws are passed providing new remedies for which sufficient remedies exist at common law. Others, to relieve against a hardship in a particular case, or to affect pending litigation, unmindful of the fact that the rule which has been established for the general good is thereby destroyed. Others, in an attempt to regulate by law matters which long experience has shown to be impossible of such regulation, because opposed to established habit and custom. A curious feature of this sort of legislation is that the more doubtful the law—the more drastic the penalty, thereby making it more distasteful to the prosecuting officers and minimizing the chances of its enforcement.

The natural result of this flood of legislation is that the greatest confusion has crept into our law. Courts are burdened with the work of construing the new statutes. No lawyer can safely advise his client in a matter in which the rule has been established for years effectively, clearly and plainly by the common law, without going through volume after volume of the statutes to see whether any new law affecting the question, either directly or indirectly, has been passed, and when found, puzzling his brain in an attempt to decipher just what the often confused language of a hastily drawn act means.

That "every man is supposed to know the law," is becoming every day more and more impossible.

As a result, nonobservance and contempt for the law grow and

respect for the decisions of the courts, the conservative force in this country, is undermined by their fruitless efforts to administer justice, while hampered with this enormous mass of legislation.

Where shall we find the remedy?

To that end, let us consider the Wisconsin legislature of 1907. We may safely assume that body to be typical of the general run of State legislatures, and a fair sample of "the rule of the common people," as it is now and as it will continue to be during the period that most of us will be interested in.

The senate, 33 members, contained 15 lawyers—some ranking well in the profession, 6 merchants or manufacturers, 5 farmers, a real estate agent, a foreman in a cigar factory, a transportation agent, a quarryman, a pedagogue, a physician and an editor. Twelve were college or university men, 6 received a high school, and 15 a common school education. The assembly—100 members—contained 25 farmers, 21 merchants or manufacturers, 18 lawyers, 10 real estate and insurance agents, 4 editors, 2 physicians, 2 teachers, 2 merchants, 2 masons, 2 carpenter-contractors, a banker, an engineer, a newspaper reporter, a broker, a clergyman, a painter, a sailor, a cigar maker, a trades union official, an hotel keeper, a saloon keeper and a caterer. Twenty-nine were college or university men—16 received a high school, and 55 a common school education.

Among these men were several of more or less experience in legislation—many possessed of shrewdness and ability. It may be truthfully said of the members as a whole that they were desirous of performing their duty well, and capable of drawing fairly correct conclusions, if the facts in relation to, and the effects of, a proposed law were made properly known to them. It is equally true that only a very few of them were qualified either by education or temperament to institute a critical examination into, or unaided determine the full purpose and effect of many of the bills they passed upon.

They were not influenced by a lobby, because that institution, using the term in its old time significance, no longer exists in Wisconsin. The law of 1899 requires every lobbyist, by the act euphemistically termed "legislative agent or counsel," to register with the secretary of state, giving the name of his employer and describing the measures he is employed to favor or oppose. He is forbidden to "buttonhole" any member and is confined in his efforts to arguments before committees or filing printed briefs with each member of the two houses. Both he and his employer are required to file with the

secretary of state within thirty days after the final adjournment of the legislature a verified statement in detail of the moneys received and paid for services and expenses.

The effects of this law have been most salutary. The lobbyists who formerly frequented the halls of the capitol and crowded the corridors of the hotels from the beginning to the end of the session have disappeared. There is no longer the opportunity and shelter for direct corruption which a crowd affords, nor any great chance for the exercise of that sinister influence, which disguised as good fellowship and operating mainly in bar rooms, commits members in advance to the support or opposition of bills of which they know nothing. No one regrets the change, except possibly the innkeepers.

Why is it that the laws passed by this legislature at a single session, after deducting therefrom all appropriation acts and acts of a minor nature, largely exceed the number of public and private acts considered by the British parliament sufficient to meet the annual legislative requirements of its empire?

Largely from three causes:

1. Want of knowledge or correct means of information as to the subject matter of the proposed laws.
2. Want of technical skill in framing laws.
3. The effort on the part of the State to legislate upon matters which should be turned over to the national government.

The first two causes are the foundation of the just criticism made of us by the Chinese official, "You proceed from premises not examined to consequences neither foreseen nor willed."

The remedy lies, first, in providing for an examination of the "premises" by placing before legislators the needed information in a compact form, and second, by supplying technical skill in drafting, laws so that the latter shall achieve ends aimed at and not lead to unforeseen or unwilled consequences.

In Wisconsin we have commenced the work by the establishment of a legislative reference library. This has been placed in charge of Mr. Charles McCarthy, to whose ability, enthusiasm and devotion to his task too much praise cannot be accorded.

As to the manner in which this is being done, I cannot do better than quote his words:

The work is divided into three main divisions. (1) The "comparative," which includes the gathering of laws and cases from all over the world upon the legislative subjects; (2) the "critical," which is

especially charged with the duty of gathering critical data upon the working of laws; and (3) the "constructive," for the purpose of scientifically drafting legislation with the evidence already mentioned at hand for reference.

The trouble with the system we have inaugurated is that it does not go far enough. The information gathered is from the very nature of the well done work too abtruse and voluminous to be attractive to the average legislator. The step remaining to be performed is to put this information into a condensed and practical form for his use, so that he can readily assimilate it and thus better comprehend present conditions and be better able to forecast the results which will flow from the changes in the law proposed. Then in addition to this, the legislator should be given, and required to avail himself of, the opportunity to have his bills drafted in a scientific manner by men possessed of the extended knowledge and great technical skill essential in that work.

To do this, a permanent body should be constituted, composed of lawyers of high standing, amply paid, to act as legislative counsel, and to be on duty during the entire session of the legislature. To these men every bill should come and they should be required to report in a concise form, on the state of the existing law on the subject matter of the bill and the constitutionality of the proposed act; make a brief reference to similar laws elsewhere enacted, and their practical workings, and redraft or correct the phraseology of the bill so as to make it accomplish its avowed purpose, limiting it to that and keeping in harmony with the existing law so far as that can be done and subserve the purpose of the bill. These reports, or at least all those relating to the more important measures, should be printed, returned with the bills to the committees to which the latter are referred, and supplied to each member.

If this were done, legislators would have the opportunity at least of acting intelligently and the number of our laws would probably be kept within reasonable limits, many foolish and unnecessary bills quickly eliminated and the task of the courts in passing upon the constitutionality or doubtful meaning of the laws greatly lessened.

The number of laws passed by the States will not be properly reduced until the people turn over to the exclusive control of the national legislature matters which that branch of the government only can efficiently handle, or, in other words, until the doctrine of State Rights to the extent which now prevails is abandoned. That this will

necessitate a modification of the present compact expressed in the Constitution of the United States is probably true.

One may have the greatest admiration for that document and the men who framed it, without believing that the latter were able to put down in written form the last word that can be said on our form of government.

To imagine otherwise, is to carry ancestor worship further than the Japanese do, and is both too flattering to the fathers, and too little complimentary to their descendants.

If John Paul Jones or Stephen Decatur were restored to life and asked to take charge of our fleet on its present cruise to the Pacific, it is more than likely that each would have some difficulty in overcoming his amazement at the fulfillment of Mother Shipton's prophecy that "iron on the waves shall float as easy as a wooden boat;" or in seeing mighty vessels move through the water without the aid of white winged sails.

Each ship in the fleet from gun turret to engine room would be a mystery to them, and the youngest midshipman on board would be better able to take charge of this modern Armada than either of these old time sea dogs, whose achievements are the boast of our navy.

That our ancestors could not foresee and provide for the changes which have come in our political situation is no more wonderful than that these two naval heroes could not and did not foresee the causes which have produced the modern battleship.

Ideas, which were natural enough among the inhabitants of States—the successors of independent colonies—resentful of any attack upon their claim of sovereign powers—where the people were engaged chiefly in agriculture and where each community was practically self-supporting, where the means of travel and communication were the stage coach and the post rider, have no reason for being in a country, the different sections of which are dependent, each upon the others, where railroad and telegraph have brought distant cities into closer touch than neighboring hamlets were in the old days.

As a result of these changed conditions, the old State Rights doctrine, "badly jolted," as a friend of mine expressively puts it, by the Civil War, is on its way to the limbo of dead religions, and the wails of its worshipers won't delay its departure.

The framers of the Constitution made provision for strengthening the hands of the government so as to compel respect abroad, and protect us against invasion from foreign foes, but it did not occur to

them that forces might spring up within the country which the States would be impotent properly to control. Yet, just that is our present situation.

Take the question of railway regulation, if that is to be anything more than a halfway station to government ownership (that possible result which Mr. Bryan intimated might come, and for which he was so bitterly criticised by many whose criticism was based upon the fear that he might be right) then it is clear that the work must be committed to those capable of handling the subject in its entirety. The regulation of the complicated freight and passenger traffic of a great trunk line, extending through several States whose system is necessarily operated as a whole, cannot be successfully managed by a series of boards, each acting independently of the other and with the jurisdiction of each limited by State lines.

As well might half a dozen doctors apportion off the body of a sick man and each, without consultation with the other, prescribe remedies for the part of the patient's anatomy allotted to him, and expect to restore him to health.

The great insurance companies, whose business extends into every State in the Union, cannot carry on that business and keep, or hope to keep, their contracts with their policy-holders, or wisely handle the vast sums committed to their charge, if, in their general management, they must submit to the necessarily confusing and discordant regulations imposed upon them by the laws of the different States, each proceeding upon a different theory.

The great trusts and combinations into whose hands or under whose control the whole of certain lines of business has come, cannot be efficiently regulated by the States. It is only when Uncle Sam gets after them that they begin to "sit up and take notice."

In all these things, regulation in the interest of the public is necessary and such regulation must be committed to the only body whose power can extend throughout the territory in which these great corporations operate, namely, the national legislature.

Just as the old Articles of Federation gave way to the present Constitution, because the former were inadequate to the situation, so the latter must submit to modification which will enable the government acting under it to meet present conditions.

To summarize: intelligent State legislation is based upon a proper limitation of subjects and the use of scientific methods. We shall obtain it, as we have reached other desirable things. We wait until

the thing gets to be about as bad as it can be, and then go in and remedy it. In one way or another, we reach the proper solution of all problems, or, as Speaker Cannon, on a recent occasion, at which I was fortunately present, expressed it:

We hear much of the dangers and difficulties which beset the republic. They are not as great or as bad as those which we have overcome. Don't imagine for a moment that this country is going to the devil. We shall meet all these questions just as we have met others in the past, coolly and courageously, and solve them with justice and clear common sense.

## THE PROBLEM OF STATUTORY REVISION

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Codification was for many years a word to provoke discussion in any gathering of American lawyers. The idea of a simple and complete code, with which the name of Bentham is chiefly associated, received great favor in this country, although the efforts to put into practice Benthamic theories were seldom even partially successful. During recent years, however, we hear little of codification. The interest of the bar and of political scientists in this theory has apparently greatly waned.

The relative merits of the common law and a code are not within our present field of discussion. The literature upon the subject would probably fill many volumes. I do not even venture an opinion whether the demerits of the code are sufficient to account for its abandonment. I do not believe, however, that the subject was really settled upon its merits or that if similar conditions to those existing twenty-five years ago were to return we should not have the discussion again revived. Probably the most powerful factor in the elimination of this idea has been the rapid increase in the written law. The question is now not whether we shall codify the unwritten law but whether we shall reduce to the form of a partial code the statutes already existing, and if so, how this result can best be accomplished. We cannot codify the unwritten law until we codify the written law.

Statutory revision as distinguished from codification in the direct sense of that term is, however, a very live question, and is the topic which it is my purpose to consider. Before entering upon this discussion, I wish to make certain distinctions and to lay down certain definitions purely for the purpose of this paper. The term code I use in the sense of a complete body of written law covering all phases of human activity and intended to supersede in its entirety the common law. By the term revision I mean the redrafting and simplification of the entire body of statute law of a State, or some consider-

able portion thereof. The term compilation I have taken to indicate the assembling under some general plan without alteration in form or substance of a large mass of statutes covering different subjects and passed upon different occasions. The revision is a re-enactment of the law intended to supersede the previous statutory law. The compilation is a statement of the law as it exists. The revision requires an actual enactment by legislative action and the adoption of the revision as an act of the legislature. The compilation if unofficial needs no legislative action; if official requires only legislative recognition.

Codification as we have already noted has made little practical progress in this country. On the other hand, the tendency in many States has been to bring together under one classification by revision or compilation the laws passed at the annual or biennial sessions of the legislatures. More or less periodic repetitions of this action keep the law somewhat near the present date. In three States (Missouri, South Carolina and Oklahoma) a revision is prescribed by the constitution every ten years.<sup>1</sup> A similar requirement existed in Texas from 1845 to 1876,<sup>2</sup> but during that period this constitutional mandate was never obeyed. In the latter year a revision was ordered by the new constitution and a further revision every ten years was made permissive.<sup>3</sup> The legislature acted upon this command of the constitution and made one revision. In contrast to these requirements is the provision in the constitution of Michigan which forbids any revision.<sup>4</sup>

Taking revisions and official compilations together, we find that five States have thus had their statute law brought together about once in every five to seven years. The period of ten years for this rearrangement is the rule in six or seven other States. About thirteen States have preferred to recast their statutes about once in every fifteen years. Some half dozen States have delayed this work so that their revisions or compilations are dated about every twenty years. The remaining States have taken official action upon this subject so infrequently that revision or compilation is an exception,

<sup>1</sup> Missouri Const., 1875, art. iv, sec. 41; South Carolina Const., 1868, art. v, sec. 3, 1895, art. vi, sec. 5; Oklahoma Const., art. v, sec. 43.

<sup>2</sup> Texas Const., 1845, art. vii, sec. 16; *ibid.*, 1866, art. vii, sec. 16; *ibid.*, 1869, art. xii, sec. 35.

<sup>3</sup> Texas Const., 1876, art. iii, sec. 43.

<sup>4</sup> Michigan Const., 1850, art. xviii, sec. 15.

while in two States (Pennsylvania and Michigan) unofficial compilations are all that exist.

Considering the question from the point of view of actual revisions, we find them very much less frequent. Eight States have never had any revision of their statute law. Only six States have had revisions any oftener than every fifteen years, while only thirteen States have revised their laws upon an average of less than every twenty-five years.

When the period which has passed since the last revision is examined, we find that six States have acted in this manner within the last five years. Four of the States have revisions dating between five and ten years ago. The period of the next five years shows nine States. There are two States whose last revisions date back between fifteen and twenty years ago, and three between twenty and twenty-five years ago. The remaining States, where they have any revisions at all, are beyond the twenty-five year period. In some of these States the place of revision has been taken by compilations, while in nearly all the others the law has been brought down near to date by unofficial compilations. In several States revisions are either in progress or under consideration.<sup>5</sup>

<sup>5</sup> The following table gives the revisions and official compilations in the various States during recent years. No effort has been made to cover in all cases the period prior to 1850. It has been sometimes difficult to determine just what class different collections of statutes belong to but it is believed that the figures are substantially accurate. The dates show codes or revisions unless otherwise indicated:

- Alabama: 1852, 1867, 1877, 1887, 1897.
- Arkansas: 1858 (com.), 1874 (com.), 1884 (com.), 1894 (com.), 1904 (com.).
- California: 1872.
- Colorado: 1883 (com.).
- Connecticut: 1849, 1854 (com.), 1866, 1875, 1888, 1902.
- Delaware: 1852, 1874 (com.).
- Florida: 1881 (com.), 1892, 1906.
- Georgia: 1860, 1873 (com.), 1882 (com.), 1895.
- Idaho: 1901 (com.).
- Illinois: 1826, 1832, 1874.
- Indiana: 1843, 1852 (com.), 1881 (com.), 1894 (com.).
- Iowa: 1851, 1860 (com.), 1873, 1897.
- Kansas: 1855, 1862 (com.), 1868, 1889 (com.), 1897 (com.), 1901 (com.).
- Kentucky: 1852, 1873.
- Louisiana: 1870.
- Maine: 1841, 1857, 1871, 1884, 1904.
- Maryland: 1860, 1878 (com.), 1888 (com.), 1904 (com.).

Because of the much greater volume of statute law English experience affords little guidance to our States. In that country there have been for many years, various commissions looking to the revision of various topics of the law. There has been, however, no movement for a general revision of English statutes, a project which would be entirely impossible. Neither has there been any general compilation, although Chitty's *Statutes of Practical Utility* in effect cover this field.<sup>6</sup>

Our federal statutes have been once revised. By an act approved June 27, 1866, commissioners were appointed to revise the general laws of the United States.<sup>7</sup> The result of their labor was the Revision of 1874. A second edition of this was made in 1878.<sup>8</sup> During recent years there have been two compilations, one, the United States Com-

Massachusetts: 1836, 1860, 1882, 1902.  
Minnesota: 1866, 1878 (com.), 1905.  
Mississippi: 1857, 1871, 1880, 1892, 1906.  
Missouri: Every ten years by constitution.  
Montana: 1895.  
Nebraska: 1866, 1873 (com.), 1881 (com.), 1887 (com.), and biennially since.  
Nevada: 1873 (com.), 1885 (com.).  
New Hampshire: 1843, 1853 (com.), 1867, 1878, 1891.  
New Jersey: 1875, 1896.  
New York: 1830.  
North Carolina: 1837, 1854, 1873 (com.), 1883 (com.), 1905.  
North Dakota: 1895 (com.), 1899 (com.), 1905 (com.).  
Ohio: 1880.  
Oklahoma: Every ten years by constitution.  
Oregon: 1887 (com.), 1901 (com.).  
Rhode Island: 1844, 1857, 1872, 1882, 1896, 1905 (partial).  
South Carolina: Every ten years by constitution.  
South Dakota: 1903.  
Tennessee: 1858, 1884, 1896 (com.).  
Texas: 1879, 1895.  
Utah: 1898.  
Vermont: 1850 (com.), 1862, 1880, 1894.  
Virginia: 1849, 1860 (com.), 1873 (com.), 1887, 1904 (com.).  
Washington: 1891 (com.).  
West Virginia: 1868.  
Wisconsin: 1849, 1858, 1873 (com.), 1878, 1889 (com.), 1898.  
Wyoming: 1887, 1899 (com.).

<sup>6</sup> See, Ilbert, *Legislative Methods and Forms*, ch. 4.

<sup>7</sup> 14 Stats. at Large, 74; U. S. Rev. Stats. (2d ed.), p. 1089.

<sup>8</sup> 19 Stats. at Large, 268, 20 id. 27; U. S. Rev. Stats. (2d ed.), pp. 1092-93.

piled Statutes, following the arrangement of the Revised Statutes, and the other, Federal Statutes Annotated, adopting an alphabetical arrangement.

In 1897 three commissioners were provided to revise and codify the criminal laws of the United States.<sup>9</sup> In 1899 their duties were extended over the laws relating to courts and practice,<sup>10</sup> and two years later they were authorized to revise all laws of a general nature. They are specifically directed to improve the form of the law and may make changes in the substance.<sup>11</sup>

Our examination of actual practice indicates that the tendency toward a revision of statute law is not particularly marked among the American States. When one-half of the States have not had a revision for more than twenty-five years, it would indicate either serious practical difficulties in the way of such revision, or an indifference upon the subject on the part of our legislatures. On the other hand, the fact that seven such revisions have occurred within the past five years, and that others are contemplated might be taken as indicating a new interest in this method of statutory improvement.

The matter is also not one which can be decided by what has or has not been done by the legislatures in the past. It is everywhere recognized that there is great room for improvement in statute law and that those connected with the making of our laws are just beginning to recognize the scientific aspects of the subject. This brings me to the question of whether a general revision of the statutes of a State at periodic intervals is desirable or practicable.

In beginning this discussion I desire to call attention again to the distinction between a compilation and a revision. A compilation requires some general classification scheme for statute law, and the fitting into such a scheme under their appropriate titles, subtitles, chapters, subchapters and sections, the various session laws. Where such a comprehensive scheme is adopted, and such a classification is entirely practical, the compilation consists merely in assigning each law to its proper place in the scheme. The greatest difficulty to be met with in this direction is the adoption of a suitable plan for section numbers. Additions to the compilations are frequently made at unexpected points, and most plans for numbering the sections, particularly when a consecutive notation is followed for the entire statute,

<sup>9</sup> 30 Stats. at Large, 58.

<sup>10</sup> *Ibid.*, 1116.

<sup>11</sup> 31 *Ibid.*, 1181.

are apt to become cumbersome. As an illustration the revisers of the Wisconsin Statutes for 1878 numbered their sections consecutively. Additions to these statutes and the revision of 1898 followed the original plan. I find among the laws passed by the legislature of 1907 one which adds section 925q-162 to the statutes. It will not be surprising if the legislature of 1909 adds section 925g-162a. This difficulty is, however, largely a mechanical one and one which may probably be solved under the principles laid down in the various library classification schemes.

In this connection it may be noted that the Wisconsin legislature of 1907 provided that all laws of a general nature, such as are adapted to the plan of the revised statutes should be assigned to their specific place in those statutes, so that future compilations can be made by simply reprinting the laws as they are enacted.

Compilations of statute law have been largely the result of a desire on the part of the lawyers to have the existing statute law under one general arrangement to facilitate reference. A busy practitioner does not desire to consult numerous volumes of session laws. Official compilations have sometimes been made by the appointment or authorization of certain persons to collate and arrange the existing law with the recognition of these compilations as *prima facie* evidence of the law. They have also been made by a similar recognition by legislative act of compilations undertaken without original authority as a private enterprise. The distinction between official and unofficial compilations is largely a verbal one. As the compilation is not enacted by the legislature it is not the law but merely evidence of the law. Its accuracy and usefulness depends not upon the fact of its recognition by legislative act, for such recognition goes no further than to make the compilation *prima facie* evidence of the law, but upon the skill of the compilers. It is at the best merely a convenience to those who undertake to consult the law, and in no way embraces the law itself.

A revision on the other hand, is a new enactment and is the law itself. If properly done, it should reduce the bulk of the law, improve its form, harmonize inconsistencies, correct errors which have become apparent in its practical workings, and give to the State a new body of law which is a great improvement upon the old. The present commissioners who are to revise the federal laws are directed to

bring together all statutes, and parts of statutes relating to the same subjects \* \* \* omit redundant and obsolete enactments and

\* \* \* make such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text.<sup>12</sup>

Not all revisions have done this. In fact in most cases, on account of the limited time which could be given to the work, the lack of experience of the revisers, or their disinclination to alter established modes of expression, the revision has amounted to little more than a compilation.

In our consideration of revisions we can ignore those which aim to alter materially the substance of the law. Such changes might be made in connection with revisions but experience has shown that the two sorts of changes do not mix and that improvement in the subject matter had best be undertaken as a separate problem. The revision of the form of the law is a sufficient task in itself; if undertaken with reference to the whole or any considerable portion of our statutes its occasion is usually not coincident with a desire for law reform; nor are the problems which confront the revisers the same in the two cases.<sup>13</sup>

The present revisers of our federal law are authorized to change the substance of the law.<sup>14</sup> This permission is contrary to the experience which I have indicated. If exercised in a conservative spirit and restricted to those changes which are generally recognized as necessary it will do no harm. If the commissioners endeavor to accomplish general reforms in the law it is likely to result in disaster.

The line between changes in form and changes in substance is one which is not very sharply drawn. In every revision there will be discovered inconsistencies in the statutes, which must be remedied in some way by the revisers. In such cases they can best secure the purpose of their appointment by drafting the law so as to follow most nearly its general spirit, and avoid innovations.

The laws of our States are greatly in need of revision. If we take an individual law out of any of our statutes we are apt to find that it is poorly drawn, that its meaning is far from clear, and that it could be expressed in a much less number of words. A compilation of the law would take this poor expression and place it in the new publication. A revision should clarify the expression, strike out the redundancy.

<sup>12</sup> 31 *Ibid.*

<sup>13</sup> See Ilbert, *Legislative Methods and Forms*, 118.

<sup>14</sup> 31 Stats. at Large 1181.

dant words, and make the law as far as possible an example of the best style of statutory phraseology.

Until one examines our laws carefully he does not realize how much redundancy they contain. Examples of this may be found on every hand. It would seem as if the lawmaker considered it necessary to prohibit a thing twice or even thrice, when once would do. The Wisconsin Railway rate law, a carefully drawn act which has been widely followed, contains this section:

If any railroad shall make or give any undue or unreasonable preference or advantage to any particular person, firm or corporation, or shall subject any particular person, firm or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared unlawful.<sup>15</sup>

Changing this to a direct prohibition and striking out unnecessary words we have:

No railroad shall make or give any undue or unreasonable preference or advantage to any person, or subject any person to any undue or unreasonable prejudice or disadvantage.

The first has fifty-eight words, the second twenty-eight but when we take them in connection with the interpretation law can we say that the first contains anything omitted from the second? This change, which reduces the section to one-half its former size, was made by simply striking out unnecessary words.

In this connection the question of provisos could be dealt with. Coke complained that the law was "overladen with provisos and additions." That the world has not changed in this respect in three hundred years is seen from the following sections from a law of Indiana for 1907.

SECTION 1. *Be it enacted by the general assembly of the State of Indiana,* That after the 1st day of July, 1909, it shall be unlawful for any person, firm or corporation, or the lessee or receiver of any person, firm or corporation, which shall own or operate any line of railroad in this State, to operate any train over such railroad by steam power unless such railroad is equipped with and has in operation an approved block system for the control of train movements thereon: *Provided*, that the provisions of this section shall not apply to any such railroad as shall not have a gross annual income from operation of seventy-five hundred (\$7500) dollars or more per mile

<sup>15</sup> Laws, 1905, ch. 362, sec. 23; sec. 1797-23 Wisconsin Supp.

of line, to be determined from its last preceding annual report to the railroad commission of Indiana.

SEC. 2. Power and authority are hereby conferred upon the railroad commission of Indiana to extend the time specified in section one of this act when it shall be made to appear to it that a reasonable necessity for such extension shall exist, provided that the extension so granted shall not exceed one year. Full power and authority are also conferred upon such commission to relieve any such party from complying with this act as to any branch or spur lines when it shall be made to appear that no reasonable necessity therefor exists. Full power and authority are also hereby conferred upon such commission to relieve any such party from the obligations imposed by section one of this act when it shall be made to appear that the volume of traffic and train movement over any such railroad are such only that the same can be dispatched without substantial hazard to life and property over a line not so protected.<sup>16</sup>

Our statutes are also poorly arranged. An examination of a law of any length often shows that clauses which should be together are widely separated. As a result of this confusion, it is necessary to go through a law from beginning to end to be sure that all relating to a particular point has been discovered. The separation of provisions applicable to the same subject may also render the law confused and misleading. A compilation of course must print the law largely under the same arrangement as it finds it, although much more can be done in the rearrangement of individual paragraphs than in the change of wording. Such a rearrangement, however, while perhaps possible under the powers exercised by a compiler, is frequently insufficient without corresponding changes in the phraseology which of course can only be made by the legislature. A revision should make this rearrangement, with the necessary changes in the diction. It should then harmonize and readjust the conflicts which are often discovered when a law is brought into its proper form so that related clauses are placed where their connection is clear.

Examples of faulty arrangement are numerous. In the Wisconsin Statutes the subject of amendments, as of course, is covered in section 2685, in chapter 121 on Pleadings. Amendments by leave of court are treated in section 2830, in chapter 127 on Miscellaneous Proceedings, eighty pages farther on.

Another weakness of our laws is their inconsistency. Not infrequently two laws covering with conflicting provisions the same sub-

<sup>16</sup> Laws, 1907, ch. 205.

ject are passed by the same legislature, while successive legislatures sometimes seem to pay no attention to what has gone before. Not long ago the legislature of this State passed a complete law for the sale of unclaimed property, apparently in entire ignorance of the fact that there already existed a law covering the same subject. Similar instances may be found in any State. The revision would discover these inconsistencies and afford means for their relief.

These troubles are fundamental. The truth of the superiority of the ounce of prevention is nowhere more apparent. Good legislation should not allow these mistakes and imperfections. Such legislation is of course extremely desirable. Its realization would entirely change the problem of revisions. Yet if we could accomplish this at once we should still have the problem of the existing law.

A real revision of statute law—one which would reduce the present bulk of law—which would render in clear language the present confused and verbose session laws of the States, which would rearrange the statutes and bring related clauses together, which would reconcile inconsistencies in the acts of the legislature—must necessarily be the work of experts. Simon Sterne, in a communication to the American Bar Association when it was discussing the subject of codification, said that before we can have codification we must have codifiers.<sup>17</sup> It is equally true that before we can have revisions we must have revisers.

The first difficulty with a revision is in the choice of the workmen. This selection must not be the result of politics, the position must not be used to furnish jobs for the faithful who have delivered the votes for the last election. The method of selection is not as important as its spirit. The executive, the legislature and the judiciary, all of whom are sometimes intrusted with appointment of revisers, are all liable to political influence in this matter. Probably the judges are least open to this charge.

The desire to make proper selections is not enough. One who is to thoroughly revise the statutes of a State needs a rare training. He must be familiar with the law in its practical operation as well as its theoretical aspects. He must know the technicalities of drafting laws—a science little understood. He must know something of legislators, their moods and their methods, for his work must meet their approval.

<sup>17</sup> American Bar Association Report, 1886, 50.

Another objection to a revision is that it requires a great deal of time. A mere compilation is no small task. When we add to the labor of arranging the existing law that of rewriting, recasting and rearranging we have a work that cannot be done in a day. Haste must be avoided. The rewritten law must be examined and reexamined until the reviser is certain that it expresses exactly the meaning intended. The revision must be laid aside and then gone over with a fresh view. If the work is hurried, if one legislature requires revisers to report at the next session, confusion and trouble will result.

The United States revision took from 1866 to 1874. Ten years ago commissioners to revise this law again were appointed, at first with a limited task and later with instructions to cover the whole field. Last year they reported bills covering two of the seventy-four titles of the Revision of 1874, which had included in that revision thirty out of one hundred and seventy chapters. Progress in other subjects has undoubtedly been made, but a decade has passed and apparently there is only a beginning.

While a general revision is being made legislation is still going on. Each session adds to the material to be worked into shape. The reviser finds much of his work undone. Time spent on a careful revision of a portion of the statutes may turn out to be wasted if the next session legislates on the subject with an entirely new law.

After the difficulties attending the preparation of the revision have been successfully met its adoption by the legislature is still necessary. This adoption must be without substantial change. A revision, if worthy of the name, should be a symmetrical whole. Amendment by the legislature is likely to affect much more than the particular section or subdivision amended.

Adoption without change will not always be easy. The legislator does not like to abdicate to the revisers his function as a lawmaker. He is undoubtedly right in feeling that the ultimate responsibility with the revision is with him, yet his desire to take a hand in the matter, however laudable from his point of view, will result in disaster for the revision.

If the revision has been a good one, if it is worthy of adoption, there has been a considerable change in the outward form of the law. Sections which formerly covered a page may be compressed into half that space. Many clauses may be omitted entirely because their substance is adequately covered elsewhere. Paragraphs have been

torn from their accustomed place and are found in a distant part of the revision. All this is true revision. If it is not to be done why revise at all, when a simple compilation will serve the purpose? But beneath these seemingly innocent changes may lurk alterations in the substance of the law which subsequent litigation may reveal. The legislature is likely to feel that its duty requires it to be satisfied that the law has remained unaltered before it assents to the revision. The examination likely to accomplish this will take time and will add to the already heavy burdens upon the time of our legislators. It has been found that the regular session affords no opportunity for this investigation and that the members of the committee which has this subject in hand must work during an extended legislative recess. Even when the work of the committee has been completed, where it has certified that the revision is worthy of adoption, there is still danger that some members will discover alterations in their favorite laws. A very few such alterations, however innocent and proper they are, may prove sufficient to overthrow the whole revision.

Instances of revisions which have failed to become law are not lacking. Cases where a very little would have defeated a proposed revision are also known. If the true history of such revisions as we have could be written we should probably find many narrow escapes and be surprised that so many had been successful.

If the revision fails, the time and energy of the revisers, and incidentally the money of the State, have been to a great extent wasted. The result of their labors will be of interest to lawmakers, just as the proposed Field codes are still examined by scholars, but the practical results will be almost nothing.

When the revision is adopted further difficulties arise. A revision reported to a biennial session requires a recess for its examination and the incorporation of the laws of the session, so that it is late in the year before it receives legislative sanction. Its publication takes a good part of another year and another session of the legislature is upon us as the revision takes effect. As soon as the revision is in force the legislature begins amending it. At the end of the session there are likely to be many alterations in the law and after a session or so much of it is obsolete.

The Wisconsin statutes were revised in 1898. In 1906, after one brief special and four regular sessions a supplement was prepared, which contained all the sections of the revision which had been amended and all new laws of general application. This supplement,

annotated in the same style as the revision, covers 1412 pages while the revision contains 2921 pages. The type in the supplement is slightly larger but even then the changes are striking.

Another objection to a general revision is that it unsettles the law. With the new form there is always more or less uncertainty whether there has really been a change in the law. This doubt is apt to continue until there has been an adjudication by the courts.

The difficulty of securing trained men who can give their time to a general revision; the great amount of time required adequately to revise all the law of a State; the troubles incident to the adoption of such a revision when prepared; the rapidity with which such a revision becomes obsolete, and the tendency of an entire overhauling of the law to unsettle previous decisions, all tend to render impracticable the periodic revision of the laws of a State.

Except in the selection of revisers, each of these objections to a general revision increases with the growth of the law. The greater the amount of the law the longer the time required for the revision and the larger the revision. The larger the revision the greater the difficulty attendant upon its adoption and the longer the time after its adoption before it can become effective. The greater the delay in its promulgation the sooner it becomes outgrown. The more law that is changed the more law is unsettled.

An increase in the frequency of revisions would to some extent meet the main objections resulting from the size of the law. This remedy would be only partial and would be offset to some extent unless present tendencies are changed by the increased rapidity with which our legislatures turn out laws. The other difficulties the trouble in the selection of revisers and the unsettling of the law, would be increased by more frequent revisions.

Were the general revision the only way in which order could be brought out of chaos these difficulties might not be sufficient to debar revisions of statute law. There is, however, a plan which, as far as I know, has never been tried in any of our States which accomplishes practically all the desirable results of a general revision and overcomes many of the objections. This is a systematic revision of the various titles or topics of the law, each one being taken separately and worked out as an independent revision.

This has been the English plan. The various statute revision commissions took up different subjects and the result of their labors is seen in acts like those relating to the coinage, the national

debt, public health, municipal corporations, merchant shipping, et cetera.<sup>18</sup>

Congress started upon this topical plan for the revision of our federal law in 1897, but at present the commissioners are acting under an authority covering the whole law. Their reports have so far been made on a topical basis, and if continued will give us revision upon that plan.

A general plan for such a revision can easily be laid out. What sort of topical headings are taken is unimportant. They will vary with the development of the law in the particular jurisdiction. Each topic, however, should cover a related portion of the law, such as elections; private corporations; insurance, or any similar subject. It should be broad enough to insure the simultaneous treatment of all connected parts, and narrow enough to allow the revisers to complete each part within a reasonable time.

Such a plan would of course require skilled revisers equally with the general revision. It would, however, be easier to obtain for the task of revising a portion only of the law the service of suitable men who could give a portion of their time.

Topical revisions would not lessen the time required to cover the whole subject. They would, however, make available part of the results of the labor of the revisers at a much earlier period. After such a revision is started bills covering several divisions of the statutes could be presented to each session of the legislature. Parts of the law which most need revision could be selected for the first work, and those which are in good shape left to the end. It is entirely possible that some titles may require revision every five years while others may require this treatment only every twenty years.

There would also be less danger that the work of the revisers would be rejected. Each topic would be considered by the legislature in a separate bill and would be of a size such as to allow of intelligent action. It would be at least possible for the legislators to understand the revision if they cared to do so, while such a thing would not be possible with a general revision. On the other hand, if a revision of a portion of the statutes fails there is less loss to the State in time and labor.

A topical revision has some positive advantages. In the selection of revisers account of the particular topic to be revised can be taken.

<sup>18</sup> See Ilbert, *Legislative Methods and Forms*, ch. 7.

A commission to do such a work should contain some person familiar with the drafting and revision of laws. It should also contain some one who had a special knowledge of the subject matter of the revision. A revision of the law on municipal corporations would need the services of at least one person who had specialized to some extent in that subject, while a revision of the law of insurance would need one with quite a different training.

With a topic of reasonably limited scope to work on the revisers can give much greater care to their subject. They can work over the various parts and ascertain whether the changes they suggest are really improvements and whether they make no alteration in the substance of the law. The proposed revision can be submitted for the general criticism of lawyers and suggestions thus received may often be of great benefit.

The result of these considerations is, I think, to indicate that the topical revision will be a better one. The advantages which it possesses over the complete revision—the ability to secure special and expert service on each topic, the opportunity to give more time to the work, the chance for more careful consideration by the legislature, all would tend toward a better revision.

The tendency of revisions to unsettle the law is true of a topical as well as of a complete revision. This, however, is the penalty of all improvement in statutes. The better the revision the clearer the law so that anything which makes for an improvement in this direction diminishes the evil from this source.

In our examination of this subject we have seen that in each State American statute law is usually grouped under one arrangement. This grouping, whether it be called the code, the revised statutes, or the compiled statutes, is either a compilation whereby the existing law is simply rearranged to conform to the classification, or a revision in which the law is redrawn, simplified and improved. The ordinary form of statutory consolidation is the compilation. Complete revisions, which are the usual form in which the revisions are made are open to various objections, including difficulties in the selection of those who make the revision, the time necessary for the work, and the dangers attendant upon their adoption. The plan of a partial revision is less open to these objections and has certain positive advantages tending toward a better revision. Revisions are probably necessary. The rapid growth of our law demands an occasional overhauling. This reshaping can best be done in small portions and the day of the general revision is probably past.

## DISCUSSION OF SENATOR WHITEHEAD'S PAPER ON THE IMPROVEMENT AND REVISION OF STATUTE LAW

BY PROF. E. A. GILMORE

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One needs only to make a cursory survey of the periodical literature, treatises on government and politics, and the reports of proceedings of numerous societies of lawyers and jurists to be thoroughly impressed that there is a widespread conviction, based no doubt upon abundant evidence, that the average popular legislative assembly, if not corrupt and venal, is inherently weak and incompetent, and to this incompetency, plus some corrupt and sinister purposes, may be charged most of the ills we suffer from an incongruous and incomprehensible mass of statute law. The legislative department, the source of all our statute law, has from the beginning been under suspicion and criticism. Our constitutional limitations have been aimed for the most part at the legislative branch, and the bulk of criticism points the same way. We have been, and still are, afflicted with overlegislation and with bad legislation. The annual output of the American legislatures, we are told, is 15,000 laws covering 25,000 pages; from 1899 to 1904 the total number of acts passed by American legislatures was 45,552 while during substantially the same period, the English parliament, legislating for 42,000,000 of home population and millions of dependents, enacted less than 1500 laws, special and general. That the laws are of doubtful quality is indicated by the fact that in New York alone during a period of about twenty years over 500 statutes were challenged in the courts for unconstitutionality, and the amount of litigation due to uncertainty in the statute law passes computation.

The evil is admitted. The need of improvement and revision of our statute law is apparent. The problem of the remedy, however, is not so clear. The evil is due to no one cause nor is the remedy to be found in any one direction. The difficulty lies partly in our political system, in the strict separation of governmental powers, in our failure to recognize the distinction between local and general legislation and properly apportioning the work of law making on such basis;

partly in the procedure and methods of legislative assemblies; partly in the character and capacity of the members of the law-making body. The remedy lies partly in certain important changes in our political system, in our methods of legislative procedure, in the improvement of the character and capacity of the legislators.

Without attempting, however, to point out all the possible causes of the present evils, or to suggest all the possible remedies, I wish merely to state several propositions which if duly taken into account would produce great improvement: The framing of clear, comprehensive, and effective legislation is a most difficult and arduous work, requiring the highest order of intellectual equipment and ability. If to interpret and administer laws when made requires the entire time and energy of a highly trained and experienced judiciary, much more does the framing of laws require experts of the highest skill and widest experience. He who gives the law ought to be at least of equal capacity with the interpreter and administrator of the law. That this is true theoretically, no one will question. Our practice, however, is just the contrary. Legislation is too often the work of the non-expert and inexperienced.

While it is often said that hysteria, blackmail, partisanship, personal ambition, and selfish interests add ten new laws to our statute books where only one is needed, it is not true that the present conditions are due in any large measure to these factors. It is the incompetency of the legislator, due to lack of knowledge and experience, which produces much of our present unsatisfactory condition. This cause, plus the irrational and absurd method under which legislators are required to work, could hardly be expected to produce anything but chaos and confusion. Unfortunately our whole scheme of choosing legislators seems inevitably to produce the unqualified law maker. While it may not be possible under our present system to produce an ideal legislature composed of men expert in the knowledge of jurisprudence and skilled in the drafting of laws, it is possible to clearly improve the average legislator by giving him an opportunity to acquire knowledge by experience, to bring to his aid the service of experts, and to create rational conditions under which his work may be done. The terms of office fixed by most of our State constitutions are entirely too short, and this limitation, coupled with the pernicious tradition of rotation in office, prevents any continuity of legislative service. No sooner does a man get into the legislature and begin to learn something of the work of law making, than he is pushed aside

in order that the next novice may have his turn. Then again the sessions of the legislature are so limited as to time and length of meeting as seriously to interfere with deliberation. In the face of all the criticism now being heaped upon legislative bodies, it may seem hazardous to suggest longer or more frequent sessions of legislatures, but I am not advocating more sessions or longer sessions, but a better distribution of the sessions or sittings of the legislature. One of the favorite constitutional methods of restraining the legislature is to keep it out of session by limitations as to time and length of meeting, and by forbidding compensation for extra sessions, but the cure for overlegislation and bad legislation is not to make it intermittent. It is a total misconception of the legislative function to suppose that it can be effectively performed by a group of men, for the most part inexperienced, coming together once every two years for from forty to ninety days and then returning to their homes. No one would expect the judicial or executive functions to be performed in that way.

Law making is a continuous business and the work of the legislator should likewise be continuous. Why should we have fixed sessions? Why should not legislators hold office for a sufficiently long time to gain some wisdom, and why should not the legislature meet from time to time for the due deliberation of proposed laws? This would not necessitate more days of legislative session, but a more rational distribution of the sessions. Nothing would seem more irrational than our present practice of crowding into one prolonged session of a fixed number of days all the law making for two or more years, and the deferring until the closing days of such session enactments both trivial and momentous, and then with shameful haste, some scandal, and little scrutiny pushing the whose mass through together. If the legislature met at stated intervals, and its sessions were regarded as continuous, it would be possible to apply to the making of the general statutes some of the care and deliberation which is expended in amending or changing our written constitutions, as for example requiring a proposed amendment to stand over one or two sittings of the legislature. Aside from certain curative and remedial statutes, appropriations, and administrative acts, there is little law making that requires haste. If a proposed law had to stand over for several sittings of the legislature, there would be some assurance that it would be properly framed with reference to existing laws, that there was some strong need for it, and that when finally passed, it would represent the best efforts of the law makers in that direction.

Such an arrangement would also make it possible to develop some coherent plan or program of legislation, instead of the present hit and miss fashion of introducing bills. It would also give more opportunity for the use of expert draftsmen and for the work of committees and commissions. Some of the best legislation to be found in our books has been the result of the investigations and deliberations of committees, composed in part of members of the legislature, and in part of specially qualified experts, sitting for long periods during the intervals between legislative sessions. No important piece of general legislation should ever be undertaken without extended consideration by such a commission, in order that the proposed laws in all their bearings might be adequately understood and considered. It is notorious that our legislators are given to patch work and piecemeal law making, to the dovetailing of new legislation into existing laws without adequate consideration of the effect of the amended statute on related subjects. These and many other defects would be largely diminished if the opportunities for deliberation and study were made possible. While the representative law-making body may be still on trial, and grave doubts may be entertained as to whether it is a necessary or efficient part of our political system, it is only fair that in its trial the conditions be made more favorable for deliberation and care. To this end, therefore, we should seek to secure a long and continuous service for the legislator, and conditions of meeting somewhat akin at least to those under which other deliberative assemblies perform their functions.

## THE REVISION OF STATUTE LAW

By MR. M. S. DUDGEON

*Madison, Wis.*

Great uncertainty as to the meaning of statutes often results because the most ordinary canons of English composition have been ignored. Intent on expressing the legislative thought in that language which we call legal, the draftsman often makes the law unintelligible to laymen.

It is important of course that the statute law be so expressed that the courts and those learned in the law may know its meaning. Yet that trial courts and lawyers do not always know the meaning of statutes is evidenced by the fact that the appellate courts are so constantly called upon to construe them. In the last volume of the Wisconsin supreme court reports, representing three months output and containing about one hundred cases, the court found it necessary to construe for the lower court or otherwise refer to, one hundred and twenty-six different sections of the revised statutes and twenty-nine chapters of the session laws. If lawyers and judges are puzzled over the meaning of these statutes it is no wonder that laymen are often at fault.

No legal maxim is so often invoked as that expressing the principle that "ignorance of the law excuses no one." The application of the principle is of course absolutely essential to the integrity of government. Yet, to enact a law the meaning of which it takes lawyers and courts months to determine, and then to visit a penalty on an innocent and ignorant layman who cannot promptly grasp its intricate significance, works an evident injustice. The principle contained in this maxim may furnish a suggestion to the reviser who strives for better expression. It may be said that a reviser's office is in part so to revise the statutes that there will be *in fact* no excuse for an ignorance of meaning which cannot be excused in law. The thought then which I have in mind and which at this time and in this time I can only suggest is the thought that the statutes should be revised so as first of all to make clear what the meaning of the law actually is—make clear

not only to the trained intellects of the bench and bar but make clear to him who runs. This is often as much a matter of good composition and rhetoric as it is a matter of technical or legal knowledge. If all rules of good English are ignored in drafting laws the result is not of course satisfactory.

Breaking a statute up into short sections, short paragraphs and short sentences often adds clearness to a law. I have in mind one section of the Wisconsin statutes which covers nearly four printed pages, contains ten sentences, some of them of course very long, and is in one undivided paragraph. It provides a complete procedure for laying out drains in country towns and includes details for appeals, rehearing, etc. The section covers twenty-three distinct steps to be taken in the proceeding before the town board. It is to be noted that the section is addressed in particular to the members of town boards of country towns—always laymen and often altogether unlettered. In such a case the mere mechanical separation of the section into shorter sentences and into paragraphs, each paragraph describing a distinct step or stage in the proceeding, and each paragraph complete in itself, would render the section intelligible. Such a change would make it possible for a member of the town board to understand clearly as he takes it each step prescribed by this section.

Then too some statutes are drawn with technical phraseology, repetitions and circumlocutions that remind one of old English conveyances of real estate. There is no more occasion for the employment of such literary style in law drafting than there is in essay writing or short story writing. What is needed in all cases is a clear idea clearly and simply expressed. What I have in mind will be understood by referring to Lord Macaulay's Indian code. Here the eminent historian and essayist made use of his command of the English language and stated legal principles in the same sort of English that he employed in stating historical facts—though his legal style is possibly more simple and direct than his historical style.

The use of exact general terms rather than a tedious enumeration of almost innumerable particulars aids in securing clearness and gives added force. In providing a penalty for burglary by a person armed with a dangerous weapon it is better to use the phrase "dangerous weapon" than to attempt to enumerate the specific weapons which the draftsman may at the moment consider dangerous. Any effort so to enumerate, however thorough, will not only render the statute long and cumbersome but will necessarily result in the omission of

some weapons that may be used. No man's imagination is lively enough to conjure up the name of every weapon which some Raffles may at some time employ. But even a veritable Raffles would be puzzled to select an instrument that was in fact dangerous to life but yet would not be well within the meaning of the simple phrase "a dangerous weapon." In this way there is secured along with clearness a certain elasticity that is an essential element in a statute.

The force of this suggestion may be appreciated by an examination of the Federal Constitution. This document is most evidently in general terms yet to an ordinary man it is clear in meaning notwithstanding some of the efforts of the courts. Innumerable disasters might have resulted had an effort been made to particularize rather than to generalize. For example the fourteenth amendment adopted at the close of the Civil War sought to protect a certain class of humble citizens in a certain section of the country by a provision that no State shall "deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Nothing could have been farther from the mind of the draftsman than that he was formulating a provision which within a third of a century would be invoked to protect great railroad corporations from excessively low rates. He certainly had no thought that the courts would hold that for a legislature or a commission to prescribe rates which did not furnish some profits would be equivalent to depriving the railroad company of its "property without due process of law." Yet the simple language used accurately voiced an elemental American principle of justice which has protected alike the despised and humble negro and the no less despised though possibly less humble railroad corporation.

The ideal statute is a clear statement of a rule or principle couched in such general language as will cover and control every particular case that may come within the spirit of the principle.

## THE REVISION OF STATUTE LAW

BY HON. HERMAN L. EKERN

*Speaker of the Wisconsin Assembly*

From the standpoint of the reviser, our statute law may, among other things, be criticised for:

1. Unnecessary duplication.
2. Lack of uniformity in sections dealing with the same or similar subjects.
3. Lack of uniformity in the sense in which the same word or phrase is used.
4. Excessive length of sections and want of paragraphing within sections.
5. Lack of classification and arrangement.
6. The intermingling of general with special, local or temporary laws.
7. Defective indexing.

Under any plan for the revision of the statutes, the work must be approved by the legislature. A revision of the statutes has meant a periodical rewriting, rearrangement and condensation of the previous revision and the subsequent session laws. Immediately after the publication of the revision, and sometimes before, the legislature would proceed to undo the work as rapidly as possible. New laws were enacted with but little reference to the existing laws. There was no attempt at classification or arrangement or to follow any methods adopted in the writing of the revision. A periodical revision hardly ever contains more than a part of our statute law and leaves a large gap between each revision to be filled in with undigested session laws.

The question arises whether the legislature itself can not be expected to do something to remedy this defect.

During the last session of the legislature of Wisconsin, a rule was enforced requiring that every bill, excepting one of a local or temporary nature, should designate the number of the section or sections which it proposes to amend or create.

A committee passed upon the bills before they were read. This committee to some extent coöperated with a department established

at the same session for the purpose of aiding members in the drafting of bills. As a result, the bills introduced assigned to each section numbers corresponding with the classification of the existing statute. Card indexes were kept showing the bills affecting each section. It became easy to learn what bills were introduced on any subject. Much duplication was avoided. At the close of the session the new session laws were printed by the secretary of state, arranged numerically by subjects according to the classification of the last revision of the statutes.

The same rule prescribed a short and concise form for bills and also required the printing of a weekly bulletin showing the exact status of each bill in both houses. Late in the session the rules were further amended to require that paragraphs within sections should be numbered and that no paragraph or section not subdivided into paragraphs should exceed fifteen lines in length.

It has been suggested that the department having charge of the drafting of bills and acting as an aid to the legislative committee which passes upon bills, should be made permanent, and that there be assigned to it the indexing of the laws and the preparation of plans for the improvement of the form and arrangement of portions of the statutes.

In this manner a gradual improvement of our statute law might be worked out according to a definite and continuous plan and approved by the legislature step by step. Each session of the legislature would then merely bring the revision of the statutes down to date, and at its end, the printer's forms might be closed and a complete new statute printed whenever desired.

The work so far leaves much to be desired. It is only a beginning but even now it will be practicable at the close of our next session of the legislature in Wisconsin, to reprint as much of the laws of the session of 1907 as remains unchanged, together with the enactments of 1909 properly arranged in one volume, and do away with any use of the volume of the laws of 1907. Such arrangement will have been the deliberate act of the legislature in doing its own revision. The same process can be repeated at the end of each session until it is thought advisable to print a complete new volume of the statutes. Thus, a person using the statutes will never have occasion to refer to more than the last volume of printed statutes and the last session law, no matter what number of sessions of the legislature have intervened since the printing of the last complete statutes. Is there not

reason to believe that with the assistance of a permanent department, the objections enumerated above, and perhaps others, may be gradually eliminated and the nightmare of periodical revisions and endless session laws done away with?

## REPORT OF COMMITTEE ON COMPARATIVE LEGISLATION

The committee on comparative legislation appointed three subcommittees: (1) on the indexing of statutes; (2) on bibliographies; (3) on ways and means.

(1) Dr. George Winfield Scott, the chairman of the subcommittee on indexing, has been very active in connection with his work at the Law Library of Congress in accomplishing some rather noteworthy results. With his assistants he prepared last year a tentative plan of a classification for an index to the federal statutes. This plan was submitted to a good many experts in different parts of the United States, and was finally accepted March, 1907, by the judiciary committees of the house and senate. Since that time much has been done in the way of indexing the federal statutes in accordance with this classification.

(2) Mr. McCarthy will of course present the report for the second subcommittee, that on bibliographies.

(3) The subcommittee on ways and means has had little to do, inasmuch as the other subcommittees have performed their work efficiently without need of any special assistance. The members of the subcommittee were, however, able to assist somewhat in securing from congress the necessary legislation in connection with the proper appropriations for indexing the federal statutes. The credit of this, however, should be given largely to Dr. Scott and the first committee.

## REPORT ON THE INDEXING OF THE FEDERAL STATUTES

The tentative plan of a classification for an index to the federal statutes, prepared under an act of congress for the approval of the judiciary committees of the house and senate, did not receive the necessary approval of the senate judiciary committee until March, 1907. Owing to this delay and also the need experienced by congress for a comprehensive subject index to the federal statutes in force, work was begun at once on a subject index to the general and permanent law found in the revised statutes of 1873 and the seventeen volumes of the statutes at large which follow; altogether about 25,000 quarto pages of statutes.

Because the personal, local and temporary statutes have constantly mixed in with them provisions of general and permanent force, every line of the 25,000 pages had to be read with the closest scrutiny. The aim was to bring to light and to accumulate under a definite category the references to all provisions on a definite subject, however scattered those provisions might be in the various sorts of enactments. The failure to employ precise language in the statutes, the use of different language at different points in the same act or in different acts to attain apparently identical objects, and the numerous conflicts and inconsistencies in the provisions of the statutes, giving rise to implied repeals and amendments, have tended to obscure the obvious construction, which it is the business of an index to note, and to retard progress. However, the index will be completed within the time estimated and for the sum appropriated, thanks to the diligence and devotion of the lawyers engaged upon the work.

The initial indexing is already finished. It consists of some 200,000 brief entries (typewritten on separate cards) followed by a reference to the volume and page where found and the date on which the statute was passed. At the present moment the entries are being carefully compared and edited and all parts of the classification are being checked up for definiteness and consistency with their cognate parts. When the editing is finished a typewritten manuscript will be prepared for the printer into whose hands it is due to arrive about

April 1, 1908. The volume will be ready for publication July 1 and will be distributed by the superintendent of public documents in the same manner as the statutes at large.

There remain to be indexed in the statutes at large all the treaties and proclamations, the statutes enacted between 1789 and 1873 and the statutes local, personal and temporary from 1873 to date. Should congress continue the small annual appropriation of \$5840 the work will go forward. It will take two years to complete it.

The work is being conducted by Middleton G. Beaman (Harvard Law School), member of the Massachusetts bar; Joseph A. Beck (University of Pennsylvania Law School), member of the Pennsylvania bar; F. Granville Munson (Harvard Law School), member of the New York bar; A. K. McNamara (Cornell University Law School), member of the New York bar; L. Russell Alden (Harvard Law School), member of the District of Columbia bar; G. W. Scott (University of Pennsylvania Law School), member of the Pennsylvania bar.

## RECENT INSTITUTIONAL LEGISLATION

PROF. J. ALLEN SMITH

*University of Washington*

The brief period covered by our history as an independent nation has been, for the student of political institutions, an interesting and eventful one. Within it have been crowded changes in political thought that have excited the apprehensions of those who fear, and inspired hope in those who wish for the ultimate triumph of truly popular government. Rightly viewed our entire history as a nation has been a record of active and unceasing conflict between opposing views of government. The real struggle, the one which is fundamental, the one which in importance has overshadowed all others, the one which in this as in other countries has had a determining influence upon the course of political evolution, has been and still is over the question in whose hands shall the power of ultimate control over the State be lodged. This question, though often kept in the background of political discussion and for that reason not sufficiently appreciated by many who have given their attention mainly to the outward and visible phenomena of our political life, is nevertheless the one which, consciously or unconsciously, has been the cause of all important changes made in our governmental institutions.

Notwithstanding the more or less prevalent belief that the one distinguishing feature of the American constitutional system is its recognition of and adaptation to the idea of government by the people, it is nevertheless true that the fear of too much democracy, rather than too little, largely determined the form in which our general government was cast in the beginning. The subsequent development of our political institutions has been due in large measure to the effort to make the constitutional arrangements inherited from our Federalist fathers a more effective means of popular rule. The whole course of later political development in this country may be viewed as the outcome of a movement to evade or break down the checks intended to guard against what the founders regarded as an undue and dangerous extension of the power of the people.

The growth of the party system with its demand that the president should be the choice of those who elected a majority of the electoral college, was a long step away from the principles of the founders. It was an effort to make the government more nearly reflect the will of the qualified voters. This, together with the removal of high property qualifications for office-holding, which in many States excluded all except the well-to-do class of voters from the important offices, indicates a growing belief that the government should really represent and be responsible to the numerical majority of the voters.

We can clearly see two different ideas of democracy underlying our political development. Both have been present in some degree from colonial times down. According to one view, the people should keep the more important matters of political organization and legislation in their own hands, while the other view would favor entrusting this business to representatives responsible to the people. It may be conceded that the latter plan, if carried out in accord with the spirit of real democracy, would satisfy the most exacting advocate of popular government. If the people had effective control over those who manage the public business, there would be little need for that more direct democracy under which the people have the law-making power in their own hands.

In the early years of our history it was the idea of democracy through representation that seems to have dominated the minds of those who set up our State governments. The early constitutions were framed on the theory that legislative power should be exercised by representatives selected for that purpose. The device of a short term of office was relied upon to make the legislative bodies respect the opinions and wishes of the majority of the voters. It was in fact this too direct dependence of the State government upon the will of the majority of the electorate that in the opinion of the conservatives of that time was its chief fault. The reaction against what the federalists regarded as an unwarranted and dangerous concession to the principle of democracy, gave us the Federal Constitution and remodeled the State governments by introducing the system of checks on public opinion. We thus started out at the beginning of our history to bring the State government close to the voters without, however, putting it directly in their hands. Then, fearing that we had gone too far in the direction of establishing the real sovereignty of the majority of the voters, we seized upon and incorporated in our political system various devices for limiting and counteracting the

influence of the majority. The division of authority, less frequent elections, and a more difficult method of removing public officials, together with the greater difficulty of changing the fundamental law itself, greatly lessened governmental responsibility and thus made the opinion of the majority a less direct and positive force. The real struggle has all along been between those who would restrict, and those who would extend the influence of the people upon governmental policies. The result has been a compromise in which we have endeavored to reconcile two views of government, which not only have nothing in common, but are in fact inherently opposed to each other. We have limited the power of the people by one set of changes in our system of government, which has to that extent made it possible for those who formulate and carry out public policies to disregard public opinion. The unceasing conflict between those who would make the majority the ultimate source of authority in all political matters, and those who would effectually curb the power of the majority, is reflected in the varying compromises between these two ideas which may be seen throughout our political history. If we accept the principle that the majority are sovereign, there is no escape from the conclusion that those entrusted with the management of public business should in some effective way be responsible to that majority. To the extent that our system of government has tied the hands of the majority, it has destroyed responsibility and made it possible for the opinion of the minority to prevail in governmental affairs.

Along with the various devices for limiting the power of the majority, we have adopted other devices obviously designed to make the majority supreme. These latter, however, are for the most part a later development—the expression of a larger measure of confidence in the people.

One class or group of these changes seems to have contemplated an approach to democracy through the form of representative government. The effort to perfect the method of voting may be included under this head. The right to vote could be of but little value for purposes of democracy until adequate registration and ballot laws protected the voter against fraud and intimidation. This was soon found, however, to be insufficient. The final choice amounted to little, if the people did not control the selection of candidates from whom the final choice was to be made. Hence the effort to secure the adoption of some direct primary scheme which will make the

selection of a public official an expression of genuine popular choice. It is beginning to be seen, however, that the power to choose is not sufficient, especially in the case of officials elected for long terms, or exercising powers which there is a strong temptation to abuse. In fact responsibility of public officials to the people may be enforced much more readily through the power to remove than the power to elect. Indeed, the multiplicity of elective offices, though apparently a concession to democracy, has largely defeated the purpose of direct election.

It is but natural under these circumstances that the effort to secure responsibility should take the form of a movement to make the tenure of office depend more directly upon the will of the voters. The power to remove being absolutely essential to responsible government, it follows that this power must in some way be exercised by or for the people. The tendency, as seen in some of the newer municipal charters, to give the power to remove public officials directly to the people, is merely the logical outcome of the effort to make our so-called representative government really representative. The movement to bring public officials more directly under the control of the people, is from present indications likely to continue, until all powers exercised through representatives are safeguarded by an effective official responsibility.

There is little reason for believing, however, that the representative principle will be the predominant one in our State and local governments. The constitutional restraints on majority rule, which have so largely defeated the efforts of democracy to attain its ends under our political system, have tended to discredit the representative principle. To escape from the evils of this system, the people have favored a large measure of direct democracy. We see this tendency strongly manifested in the democratic movement which sought to establish popular control over the State governments in the first half of the nineteenth century. This assumed the form first of giving the voters the right to participate in the making of the fundamental law of the States. The recognition of the people as part of the constitution-making machinery was not designed to give them more than a mere negative of proposed changes in constitutional law. The control of the State governments, which had been in the hands of the numerical majority of the legislature during the Revolutionary period, was greatly limited by the introduction of the system of checks and balances during the subsequent period when federalist

ideas of government dominated American politics. The principle of limiting the power of the majority had already been incorporated in our political institutions, before the movement to give the people a voice in the enactment of constitutional law became general. Thus in the beginning, this movement to refer constitutional law to the people did not involve any recognition of the idea that the majority of the people are the source of all authority in the State. The right to propose changes in the Constitution was the prerogative of a representative body, and the power of the voters consisted in their right to accept or reject proposals thus submitted to them—proposals which had already been approved by some extraordinary majority in a representative body, or for the ratification of which, perhaps, an extraordinary majority of the voters was required.

The progress of democracy has had some effect in minimizing these restrictions on majority rule. Despite the difficulties which the federalist distrust of government directly responsible to the people, placed in the way of popular control, the force of public opinion has made important inroads upon the system of checks. The enactment of constitutional law has in some States been brought more nearly into harmony with the idea which, since the extension of the suffrage, has come to be more or less widely accepted—that the majority of the voters are the final authority in the State. This is seen in the gradual removal of excessive restrictions upon the exercise of the constitution-making power, the concurrence of a majority in the legislature and a majority of the voters, in some cases, being all that is required. Where this stage is reached in the development of our constitutional law, the people have full negative power as against their legislatures and constitutional conventions. This negative applies, however, only to the constitution as it leaves the hands of the representative body which has framed it. Its content is under our system of government a matter to be subsequently determined by the courts, and with reference to the interpretation thus placed upon it, the veto power of the people does not apply. The most that we can say, then, is that the popular veto in this form is limited to the preliminary stage of constitution-making, and can not be employed to prevent innovations due to judicial construction.

Moreover, it often happens under our system of checks that constitutional provisions which have been submitted to and ratified by the voters, are inoperative for the reason that the legislature neglects or refuses to enact laws needed to make them effective.

In working out the policy of direct participation of the people in law-making, we have tried to harmonize it with the system of checks upon which it was grafted. And as the distinctive feature of our system of checks is the restraints imposed upon the majority, our referendum, as a means of ascertaining the popular will, has not infrequently refused to recognize the numerical majority. Thus where the people concur, it may not be the will of a simple majority, but a majority of three-fifths or two-thirds that is required. This is often true with reference to the more important matters upon which the people are consulted.

The tendency toward direct legislation has been more or less pronounced ever since the suffrage was extended in the various States. The effort to give the people more influence over legislation was largely forced into this channel through the constitutional checks which prevented the free growth and development of a truly representative democracy. Being unable to exercise any effective control over their representatives, the people were compelled by force of circumstances to turn to direct democracy as the only means of attaining their ends.

There is scarcely room for doubt that in remodeling the State constitutions in imitation of the Federal Constitution, no provision would have been made for direct popular participation in law-making, had it not been for the influence exerted upon them by the growing belief in democracy. This new force made itself felt upon the legislatures, which began to show a disposition to allow the people to decide by a vote at the polls whether certain proposed laws should be enacted. This effort of the legislature to let the people have a voice in the making of laws was met by the courts with the doctrine that legislative powers could not be delegated. To overcome the opposition of the courts it was necessary to modify the constitutions by reserving to the people the right to exercise this power.

Popular government, as the term is now understood, implies more than the mere right of the people to give or withhold their assent to changes in the constitution or the laws. The referendum, or the submission of constitutions and laws to the voters for their approval or disapproval, merely gives the people, to the extent that this practice prevails, a veto on the actions of their representatives. More than this is needed to make the policy of the State reflect the will of the people. Some power should be within the reach of the voters by which they can force their will upon unwilling and more or less irre-

sponsible representatives. One way of securing this is by placing the power to initiate constitutional and other legislation directly in their hands. When this is done, public opinion becomes a force which must be recognized and obeyed by public officials. And since it is on account of constitutional obstacles that democracy has been unable to make purely representative institutions serve its purpose, we must expect to see the direct intervention of the people, through the initiative and the referendum, more generally resorted to as a means of overthrowing minority rule in our State and municipal governments.

No one who is familiar with the history and working of our political institutions, could claim that they are in harmony with the ideas of government now generally accepted. The progress which democracy has made throughout the western world during the last century has changed our point of view with reference to political questions. The fear of popular rule and the desire to subordinate public opinion to the opinion of the minority, which so largely determined the form originally given to our political arrangements, have, with the extension of the suffrage and the growth of democracy, been largely superseded by the belief that the undoubted will of the majority of the voters ought to be regarded as the ultimate source of authority in the State. That our constitutional system, designed to tie the hands of democracy, has not encountered more serious opposition, must be attributed to the fact that the people generally have not been able to trace the evils of our so-called democracy to their true source—the constitutional checks which have had the effect of giving the minority a really controlling voice in political matters. It is, however, coming to be quite generally understood that the majority of the people are often powerless, under our system, to compel or prevent the enactment of laws. As soon as the people become fully conscious of this fact, and moreover realize that it is but the logical result of the constitutional checks on the majority, it is to be expected that they will favor any changes in the system which will give them more control over the government.

The recent tendency in municipal government is at least significant. The so-called commission system of city government is, in fact, a natural and indeed necessary change in the governmental organization of our cities. It is an attempt to simplify the cumbrous and unwieldy machinery of municipal government, to eliminate the whole antiquated system of divided powers, and substitute therefor a single

governing body directly responsible to the majority of the voters. This is merely going back to the principle which we discarded under the influence of the federalist reaction against popular government. Our early State constitutions, framed on the theory of centralizing power in the legislature and making that body in some measure responsible to the voters, were soon superseded by the system of checks on the majority, and now after a trial of this system extending over a period of more than a century, we are beginning to realize that good government is not furthered by limiting the power of the people, but by removing the checks which have heretofore prevented them from exercising effective control over governmental affairs. Government in obedience to public opinion may not be perfect, nor is any intelligent person likely to claim this merit for it, but it is certainly less liable to be corrupt and intolerably selfish than any in which it is possible for those who manage the public business to disregard the will of the majority. Any solution of our present political problems which harmonizes with modern thought, must recognize the real sovereignty of the people; and this means, if it means anything at all, that the will of the majority of the voters is the ultimate source of authority. This is already accepted in all democratic countries except our own. It is quite generally taken for granted that this is the distinguishing feature of our own governmental system, although this view has little foundation in fact.

We must sooner or later choose between two ideas of sovereignty. We must either recognize the majority as ultimately supreme and make our political organization conform to this view; or abandon this idea and admit the right of some other authority to impose its will upon the majority. To limit the power of the majority, as has been the American practice, is in effect to give the minority a controlling voice in many matters of vital importance. It is the growing recognition of this fact that accounts for the movement to make the majority supreme, either through effective official responsibility, or through the initiative and the referendum.

It is coming to be understood that our complicated system of checks makes it extremely difficult to secure any effective expression or enforcement of public opinion in relation to governmental matters. In view of this it is perfectly natural that the people should manifest a determination to take the molding of legislation more largely into their own hands.

It is not likely that any such changes as those which contemplate

the transfer of political power to the majority of the voters, can long be successfully opposed on the ground of unconstitutionality. Such a movement may, it is true, be temporarily retarded by obstacles of this sort, but when an intelligent public opinion in favor of these reforms is thoroughly crystallized, it is reasonably certain that opposition will have to yield. The people will have little patience with minority control when they come to recognize it as such. The misconception of our system of government, which has been and still is so widely prevalent, must be ascribed in large measure to our political literature. The checks designed to limit the influence of public opinion have usually been discussed as if they were originally intended as a means of making the power of the people supreme. Indeed the right of the minority to veto the will of the majority has never been expressly recognized in our political literature, though it is the very essence of the American scheme of constitutional checks. In working out the interpretation of our constitutional system, we have tried to harmonize it with the idea of popular sovereignty. Thus the Constitution, though even at the time of its adoption in no true sense the expression of the will of the people, has by a sort of legal fiction been treated as the highest and most authoritative expression of public opinion in matters political—an embodiment of the ideas and aims of the people with reference to government, binding upon the people themselves until modified in the manner provided for in this original declaration of the so-called popular will. It suited the purposes of the federalists, and of all who wished to limit the influence of public opinion on legislation, to regard this original indirect expression of the will of the people, as more authoritative than any subsequent expression more directly made in the ordinary course of legislation. It also fitted in with their purpose to hand over to that organ of government most remote from the people, and consequently least influenced by the public opinion of the time, the power to interpret this original expression of the popular will, and to overrule any subsequent and more direct expression of the will of the people which it might regard as in conflict with it. The evident purpose of this arrangement was to curb the influence of present public opinion, though this reason has not been much discussed in our literature on government. The question which believers in democracy are beginning to ask, and to which they may demand a satisfactory answer in the future, is why a non-elective lifeholding body is a more trustworthy interpreter of the will of the people than the people themselves, or the organs of

government that more directly represent them. This method of ascertaining the so-called will of the people can not be reconciled with the idea of popular sovereignty as it is now accepted. But while the effect of our constitutional system, and indeed its underlying purpose, has been to deny the real sovereignty of the people, we have tried to give it an interpretation that would make it acceptable to the believers in democracy. This accounts for the fact that so many who believe in the real sovereignty of the people, have at the same time accepted our scheme of checks as a device for safeguarding the expression of the popular will.

This effort to reconcile our governmental system with the fundamentals of democracy, has laid the foundation for a more liberal interpretation of our political scheme. The outward acceptance of democracy by those who defend our constitutional system, makes it increasingly difficult to enforce any checks on public opinion, which have come to be recognized as such. The growing belief in popular government, and the admission even by conservatives that the will of the people is the final authority under our system of government, warrant the conclusion that the people will be impatient of any constitutional device which they come to recognize as constantly thwarting their will. Constitutional arrangements which refuse to yield to the pressure of an enlightened public opinion can not long survive. To insist on a narrow or obsolete interpretation of the Constitution, would be almost certain to direct attention to the system of checks, and in the end lead to a sweeping modification of our political arrangements. It is for this reason not likely that the courts will deal with measures designed to bring the government more directly under the control of the people as they would have done earlier in our history, when the belief in democracy was a less definite and aggressive force.

There can be little room for doubt, however, that the initiative and the referendum, recognizing as it does the right of the people to formulate and give authoritative expression to their will without the intervention of a representative body, is not in harmony with our constitutional system as it was understood by those who originally established it. But far more important is the fact that it is calculated to give effect to what the people want, and for this reason is in accord with the alleged and generally accepted, if not real, purpose of our constitutional system.

The general adoption of such a measure and the acquiescence in its constitutionality, would change fundamentally the character of

our political system by conferring the real sovereignty upon the people. But inasmuch as the people are already supposed to be sovereign, the change is one which would do no violence to our generally accepted political ideas. According to the popular view of the matter, it would merely make the practice of our system harmonize with its theory.

The most important check on the people—in fact the one upon which all others depend—is the difficulty of amending our constitutions. If this one check were broken down, the majority would become supreme, since they would be able to make any changes in the system that might be needed to insure the enforcement of their will. That this is not improbable, recent tendencies in our constitutional development seem to indicate. The use made of the initiative and the referendum for the purpose of amending State constitutions is to say the least significant. If this policy should be generally adopted, our State constitutions would cease to be a check upon the people and become instead a check upon their representatives. If the majority should thus acquire the power to enact constitutional legislation, it is evident that no branch of the State government could thwart public opinion. Even the judicial veto would fall into disuse as against laws made by the people, since no satisfactory reason could be given for the exercise of this power when the people are the real source of both constitutional and ordinary legislation. The initiative and the referendum would thus make the people supreme.

## MASSACHUSETTS PUBLIC OPINION BILLS

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Direct legislation has found in Massachusetts a soil less congenial for speedy growth than in most of the other States. This has been due in part to the commonwealth's deep-rooted conservatism. To be sure her population has undergone most radical changes. Massachusetts has become the city State. More than two-thirds of her people—a proportion higher than in any other State—are living under municipal government, in cities of 12,000 and over. Thirty per cent of the inhabitants of the State are of foreign birth, while at least 25 per cent more are of foreign parentage. Yet, in spite of the fact that in hardly any other American State have the transforming influences of city life and immigration become so powerful, they have not succeeded in sweeping the commonwealth far from its ancient moorings: the Constitution of 1780 remains its fundamental law, and the traditions of a century and more ago control the voter of today.

The slowness of the growth of the direct legislation movement in Massachusetts has been due also, in part, to the relative excellence of her system of representation, from which it results that defects and abuses which have proved a serious menace in connection with legislation elsewhere have not caused equal alarm in the Bay State. In the first place, both houses of her legislature have a membership large enough to make possible pretty thorough-going representation.<sup>1</sup> Moreover, to a greater extent than any other New England State, Massachusetts approaches genuine equality of representation. Her legislators are elected by districts. Charges of gerrymandering are not very common, and there is here no representation of rotten boroughs which is for a moment to be compared with what is to be found in Rhode Island and Connecticut, and to a less flagrant extent in several other States.

<sup>1</sup> Her senate of 40 members is exceeded by but three other senates in New England, and three more in the rest of the country; her house, of 240 members, is exceeded by but three, all of which are in New England.

And, lastly, her elections are annual. Each year, thus, every one of her 280 legislators, who wishes to return to the State House, must come before the people for their verdict. By this means there is secured a degree of responsibility to the people, a swiftness of possible censure, greater than in almost any other American State.

Nevertheless, the past fifteen years, so fruitful in direct legislation measures elsewhere, have not been lacking in a vigorous propaganda in Massachusetts. In 1894 Governor Greenhalge endorsed the principle of the referendum, and earnestly recommended the enactment of a law for the submission of all acts of a local character to the municipalities affected by them. For a time, it looked as if the Bay State were to be stampeded into the adoption of the referendum; for the committee, to which had been referred the petition (headed by a trade-union journalist), in favor of a general referendum, reported a resolve providing for both a general and a local referendum, and this was adopted in the house by the astonishing vote of 156 to 2. The senate, however, amended the measure in such a way as to rob it of all force, and the house refused to concur. So the measure was lost.

It was half a dozen years before direct legislation propositions again secured the serious attention of the legislature. In 1900 there was presented a petition headed by a representative of the State branch of the American Federation of Labor, for a constitutional amendment providing for a popular initiative of amendments to the constitution. At that session, and also in the one following, this measure was ardently advocated by two or three members of the house, but reference to the next general court was its fate. In the third year, it was favorably reported from the committee, only to be voted down, practically two to one, in the house. Meantime, a general referendum measure was zealously championed by the same group in the house, and in the senate a resolve in favor of a referendum upon legislative measures was approved in 1902 after it had been so amended as to require that the demand for a referendum upon any measure be signed not by a mere 10 per cent of the voters in the commonwealth, but by 10 per cent of the registered voters in its every city and town. The motive of this amendment is obvious, for, in a State containing 354 individual municipalities, varying from 150 to 600,000, the task of securing the requisite signatures would prove a sheer impossibility.

But the Massachusetts legislature of 1903 showed unwonted eagerness for novelty in many directions. Quite a variety of direct legisla-

tion propositions were submitted, and house and senate finally concurred in proposing an amendment to the constitution providing for a popular initiative of specific amendments to the constitution on petition of 50,000 qualified voters.<sup>2</sup> But a proposed amendment in Massachusetts must first be passed by special majorities in the legislatures of two successive years and then submitted to the people; and when this amendment came before the legislature of 1904, it was given short shrift: the committee's report was adverse, and neither branch of the legislature gave it approval. And since that set-back to the present day, though many petitions for referendum or initiative measures have come before the legislature, not one of them has secured a favorable report.

It was after this baffling experience of 1904 that the advocates of direct legislation approached the general court of 1905 along a new line of attack. A representative of the American Federation of Labor (who two years before had been a petitioner for "an advisory referendum on certain matters pending before the general court"), now joined with several others in a plea for "legislation providing for the submission to the voters at the polls of questions of public policy in order to secure expressions of public opinion."

The house passed a bill based upon this petition by a close vote (89 to 78). In the senate, though ordered to a third reading, it was finally rejected by a vote of nearly two to one (10 to 19). The following year, upon a petition for legislation to "allow the voters to indicate their opinion upon important matters of public interest," the house passed the proposed bill, but in the senate it was rejected (12 to 17). At the next session, that of 1907, a similar proposition came before the legislature, backed by the Massachusetts Public Opinion League, which had been organized for the express purpose of urging this measure, and which claimed to have secured from a majority of the senators-elect pledges that they would vote in its favor. In the house of 1907 a bill was reported, petitions were received in its favor, and public hearings given; but the bill was, nevertheless, rejected by a vote of nearly two to one (135 to 80). In the senate the matter was not even brought to a vote.

The essential features of this last public opinion bill, as it emerged from committee and received the sanction of the Public Opinion

<sup>2</sup> Petitions for legislation of this nature have been presented at practically every session since 1893, but "leave to withdraw," or "reference to the next general court" has been their inevitable fate.

League, are as follows: Upon request from 1000 registered voters, asking for the submission of a question for an expression of public opinion, the request shall be referred to the State ballot law commission, a bi-partisan board of three members. If they determine that such question is one of public policy, they shall draft it in such simple, unequivocal, and adequate form as they shall deem best to secure a fair expression of opinion. Suitable forms of petition shall then be prepared and furnished, each form containing spaces for not more than 100 signatures. If, 60 days before the State election in question, these petitions shall have been filed, signed by 5000 voters, this question shall be placed upon the official ballot to be used at the next State election. No application is to be received which had been issued more than twelve months before the election concerned. Provisions were added for assuring the genuineness of the signatures both to the requests for the issuance of forms, and to the petitions. It was also provided that not more than four such questions should be placed upon the ballot at any one election; and that, after being negatived, substantially the same question should not be again submitted within less than three years.

This bill differs in several respects from its predecessors. It reduces from ten to less than one the percentage of the total number of registered voters whose applications are necessary in order to secure the placing of a question upon the ballot. On the other hand, it doubles the number of questions which may be voted upon at one election. These changes called from one of its opponents the comment that it was "twenty times more radical than the bill of the previous session."

The bill is notably reticent as to its real object. It was entitled "An act to authorize the submission to voters on official ballots at State elections of questions of public policy." But for whose benefit is this expression of public opinion to be secured? Oregon legislation has been more frank. In the law framed to secure a virtually popular election of United States senators, elaborate provision is made for the transmission of the results of the people's vote to the presiding officers of both branches of the legislature, who are required to lay them before the chambers, when assembled to elect a senator; the votes must then and there be canvassed and the name of the candidate having the highest number announced, "and *thereupon* the houses shall proceed to the election of a senator." In this Massachusetts measure, no provision is made for thus obtruding the people's

"opinion" upon the minds of the members of the legislature. It is assumed that the news of the popular vote will percolate the walls of the State House.

This proposal, novel in Massachusetts, has its clearest precedent in the Illinois law of 1901. This provided a form of what is loosely called an "advisory initiative" both for the State and also for cities. Upon the petition of 10 per cent of the registered voters, not more than three "questions of public policy" may be submitted to the voters at a State election. In the year following the passage of this act, three such questions were submitted, and all passed in the affirmative by majorities of five or six to one. In accordance with one of these votes, two acts have since been passed by the legislature. In 1904, again, three "public policy questions" were voted upon, the answer in all cases being favorable by majorities varying from between three and eight to one. Two acts, passed upon the basis of one of these votes, have since been declared invalid by the supreme court. A primary bill, based upon such a popular vote, is now monopolizing the attention of the Illinois legislature in its present strange state of suspended animation. For city votes of this nature, the law provided that the petition of 25 per cent of the registered voters should be necessary in order to secure the placing of questions before the people.<sup>3</sup> It was under this law that in the fall of 1906 for the third time the people of Chicago put the city on record in favor of the municipal ownership and management of street railways. To thorough-going advocates of direct legislation this Illinois law has given only moderate satisfaction. Since it provides merely for a vote expressive of an opinion, and not for an "instruction" to the representatives, and since the members of the legislature usually have not been pledged in advance to support these measures, some which met with popular favor have been ignored or suppressed by the legislature.

During the past year there has been something of a campaign in favor of an advisory initiative in Iowa, and for both an advisory initiative and an advisory referendum in Delaware, New Jersey and Minnesota. In Delaware the popular vote was favorable, in 1906, to this proposal by a majority of more than eight to one, yet the total vote was little more than one-half the vote for congressional candidates. It is claimed that under instructions from politicians, the election officers handed out the referendum ballots only when they

<sup>3</sup> Similar advisory powers in municipal affairs have been secured for the voters in Iowa and South Dakota.

were asked for. When the project came before the legislature, much stress was laid upon the smallness of the popular vote. It was passed by the house, only to be pocketed in senate committee.

One of the most interesting features of the campaign of the present year in Massachusetts was the controversy over the nature of representative government intended by the framers of the Constitution of 1780, and the effects upon it to be anticipated from the proposed legislation. To the conservative's charge that it was radical, even revolutionary, its advocates retorted that it would merely restore in part a right freely and frequently exercised in colonial days, a right explicitly asserted in the Constitution of the Commonwealth, and by the Fathers considered a normal feature of representative government in Massachusetts. Indeed, the Public Opinion League seemed to devote its main energies to an attempt rather to establish the historic precedent upon which they claim the public opinion bill stands than to proving the expediency of the proposed measure.

To the Bay State men of the last quarter of the eighteenth century, the prime essential in a constitution was a formulation of the rights, privileges and immunities of the citizen as against the government, in other words, a bill of rights. The lack of this was what placed the ratification of the Federal Constitution in peril. In the convention which framed her own constitution, almost the first step taken was to assign the drafting of the bill of rights to a strong committee (upon which were placed John Adams, Sam Adams and James Bowdoin), who showed their intelligence by virtually turning over the whole task to John Adams. With the exception of one or two sections, it stands today as it left his hand. The particular provision which has figured in this present-day controversy reads as follows:

**ARTICLE XIX.** The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

Giving instructions to representatives, here asserted as a right, was no innovation. The practice had been much in vogue, particularly in Boston. At least twelve times during the seventeenth century the men of Boston, in town-meeting assembled, gave instructions to their deputies in the general court. In the eighteenth century such instructions had been given at least thirty-six times before this article was embodied in the State Constitution; they had averaged

once a year during the preceding decade. As Boston was the capital of the colony and the center of its political life, it is probable that the interest taken there in the debate of proposed measures and in the instruction of the legislators was greater than in any of the other towns. In Worcester, from the beginning of the town's life down to 1782, instructions had been voted eleven times, the earliest having been in the year 1765, and consisting simply of the following:

That it be an Instruction to Capt Ephraim Doolittle our Representative that he Joyns In no Measures Countenancing y<sup>e</sup> Stamp Act.

In the following year, instructions were given upon nine points, the last of them being:

That you Give Deligent attendance at Every Session of y<sup>e</sup> General Court of this Province this Present year and adhear to these our Instructions (and y<sup>e</sup> Spirit of them) as you Regard our Friendship & would avoid our Just Resentment

Later Worcester instructions were cast in less menacing language. For the most part those of the period dealt with the troubles with Great Britain, but protests against the burdens of taxation were frequent. Thus in 1767 the representative was instructed to use his

Indeavour to Relieve the People of this Province from the Great Burden of Supporting so many Latin Grammer Schools whereby they are Prevented from attaining such a Degree of English Learning as is necessary to Retain the freedom of any State

The representative of a decade later (1784) was instructed by the Worcester town-meeting to use his best endeavors to get the general court removed from Boston to some country town on the ground that the sea port towns by the general court being held in Boston have great advantage of the Countrey Towns by takeing the advantage of a thin house to call in all their members to carry any motion that best Serves their intrest.

Instructions for representatives were usually prepared by a committee appointed for that especial purpose, who reported their draft to the town-meeting, where each article was discussed, modified if need be, adopted or rejected. They covered a wide range of interests: education, morality, manufactures, commerce, the fisheries, taxation, relations with Great Britain, etc., and varied in length from a line or two to half a dozen pages. They often expressed the utmost confidence in the representatives chosen; and men of eminence and

capacity accepted election, although they knew that they would be subject to such instruction. An excellent illustration of the tone of these instructions is afforded by the resolutions of the Boston town-meeting of 1764:

"By this choice, they, (the freeholders of this town,) have delegated to you the power of acting in their Public Concerns, in general, as your prudence shall direct you; always reserving to themselves the Constitutional right of expressing their Minds, and giving you such Instruction upon particular Matters, as they at any Time shall Judge proper. Although the preamble stated that the election "affords you the strongest Testimony of that Confidence which they place in your Integrity and Capacity" there follow two pages of specific instructions.

Nor did the custom of instructing representatives lapse with the adoption of the constitution, in which, as we have seen, its exercise was asserted as a right. In 1783, upon the committee to prepare the Boston town-meeting's instructions to representatives was Sam Adams, himself, who had so recently served as a member of the special committee to draft the bill of rights. It is safe to assume, therefore, that the instructions prepared by this Boston committee in form and spirit were in precise accord with the intent of the framers of the Constitution. They certainly are sufficiently explicit; beginning with commendation and expressions of confidence, they proceeded to remove any doubt as to the final source of authority:

We confide in your Integrity and good Understanding to conduct the Public Affairs in our Behalf in such Manner as to promote the Interest and Safety of the Commonwealth at Large and of this Metropolis in particular. It is nevertheless our unalienable Right to communicate to you our Sentiments; and when we shall judge it necessary or convenient to give you Instructions on any Special Matter, and We expect you will hold yourselves at all times bound to Attend to and to Observe them.

After the days of the Revolution and its attendant disturbances were past, the practice of instructing delegates seems to have fallen into general disuse. In later years, instances of its exercise became practically unknown, and it occasioned not a little surprise when, in the middle of the century it was unearthed and made use of to put an end to an obstinate deadlock in the legislature over the election of a United States senator. The Massachusetts legislature which met in 1851 was controlled by a coalition of democrats and free soilers. Charles Sumner was the free soil candidate for the senatorship, but

when the time of the election came, the democrats in considerable numbers bolted his nomination, and the election was thus held up for more than three months. The struggle dragged on until town-meetings were called in several towns, and the representatives were there instructed to vote for Sumner, a mandate which not a few of them were glad to obey. This enabled enough men to change their voting, so that he was speedily elected.

From a reading of article xix of the bill of rights and from a study of the early instructions, there can be no doubt that it was the intent of the framers of our Massachusetts Constitution to assert the right of instruction; that such instructions were frequently given, and with the expectation that they would be considered binding; and that this act of instructing was not thought inconsistent with the system of representative government, nor derogatory to the dignity and independence of a representative in such a degree as to prevent men of eminence and capacity from accepting an election to the general court.

One distinction of importance, however, is to be emphasized between the unvarying exercise of this right of instruction in the past and the method which these public opinion bills present for the future. The historic giving of instructions was—so far as I can discover any evidence—invariably by the individual town, in town-meeting assembled, to the representatives of its own choice, and to no others. To this town-meeting it was not only the privilege but the duty of every voter to come. There the several articles of the instructions were subjected to discussion, one by one, and each voter present might question, approve, or protest. In practically every instance, all this took place in the very presence of the men to whom the instructions were being given. It was, therefore, possible for them to take a citizen's part in the discussion; they could not fail to get at the precise spirit and meaning of the instructions as there adopted by the majority, and if these did not accord with the representatives' opinions, it was possible for them, then and there, to decline to serve, rather than accept office under an obligation to act contrary to their best judgment. In sharp contrast with this, the historic mode of instruction, the so-called "advisory initiative," as provided for in our last public opinion bill, would put pressure to bear upon the representative by a majority not of his own townsmen by whom he had been elected, but by a majority of the number of voters from all over the State—and that number might be but a small minority of the

electorate—who were interested enough to vote upon this particular question. There is here no assurance—as in the instruction by town-meeting—that the voter has had both sides presented to him. Moreover, an interesting question of divided allegiance might often present itself. If the voters of Brookfield, in town-meeting assembled, instruct their representative-elect, John Brown, to support a certain measure, and if, on that same day, the State election results in the passage of a public opinion vote virtually instructing, or advising, all representatives to oppose that very measure, what ought John Brown to do? This dilemma is by no means a visionary one. Unless it be conceded that instruction by town-meeting is entirely a thing of the past, it is not at all improbable that in many cases the public opinion vote would come in sharp contradiction with instructions already given by the town.

The advocates of the Massachusetts public opinion bills, in my opinion, have made good their contention that it was the intent of the framers of the Constitution to assert for the voters a right to give to their representatives mandatory instructions. They have shown that the growth of cities has made the exercise of this right by the town-meeting method in the city constituencies entirely impracticable. On the other hand, I believe that they are wrong in their insistence that instruction of representatives by majority vote of the massed voters of the commonwealth would accord with the intent of the framers of the Constitution. To the men of 1780 the town was neither a mere blotch on the map, nor a convenient election precinct; it was a political entity, in many cases older than the State to which its delegates were at that moment giving a fundamental law; and it was entitled to speak with its own voice, without having that voice drowned by the clamor of other towns, still less by that of an aggregation of voters from the State at large.

The opponents of the measure laid stress upon the inadequacy of the precedent urged by its advocates, and insisted that the adoption of the public opinion vote would be a distinct innovation and a radical departure from the principles of representative government. They advanced the arguments usually put forward in opposition to any form of direct legislation. They insisted that the mode of securing this popular vote upon a "question of public policy" gave little warrant for the assumption that it would represent the real *opinion*, the reasoned conviction of the people of the commonwealth. They also attacked what they deemed extravagances of the bill, such as the

small number—less than 1 per cent of the qualified voters—into whose power it gave the opportunity to force propositions before the people; and they criticised the laxness of the precautions to ensure the genuineness of signatures to the petitions and applications.

The failure of the bill before the legislature was due in part to the lack of agreement among its advocates as to its real intent and probable effects. It is to be assumed that most of its supporters were propagandists of direct legislation. Yet some of its leading advocates declared themselves not in favor of the initiative and referendum, and grounded their action in supporting this bill upon the claim that this was a preventive measure, which would make unnecessary recourse to more radical devices, the popular vote being merely an expression of opinion. To the writer, this position seems illogical if not disingenuous. The sole purpose in securing the popular vote can be only that it may put upon the legislature strong pressure in favor of the measure advocated. Propagandist journals in favor of direct legislation frankly call such an "advisory initiative" the "entering wedge" for direct legislation, and I do not see how anyone can read the story of the past fifteen years of struggle without accepting that as the natural view to be put upon it. It is conceivable that an ill-advised measure might be passed by popular vote. If, then, the legislature, with its better opportunities—too often neglected—for thorough and candid investigation, should defeat it, the veriest tyro in politics must know that against the members so voting there would be urged with great bitterness, not primarily their attitude upon the real merits of the measure in question, but their "thwarting the will of the people." Thus the effect would be to urge on the direct legislation propaganda by an appeal to popular resentment, whenever the legislature failed to translate into law an "opinion" which may have secured a by no means warranted approval at the hands of a narrow majority in a small popular vote.

Not less significant than the bills themselves and the course which they have run in the legislature are the trend of the measures and the character of the support which they have enlisted. The measures, as has been indicated, have become distinctly more radical. Yet legislative proposals of a character which, a few years ago, found their chief advocates among radicals, labor leaders and socialists, have now been zealously supported by men of influence in quite other ranks. The leader in the last campaign, as president of the Massachusetts Public Opinion League, is a man who has done efficient work in

reform politics both in city and State, and who, a few years ago, polled a substantial vote as a candidate for the governorship. Among the most earnest speakers for the bill from the platform of Faneuil Hall were Edwin Doak Mead, reformer and publicist, and President Eliot of Harvard University. Such accessions to the ranks of its supporters have both evidenced and contributed to the substantial growth of this movement. Nevertheless, in the commonwealth at large the project seems as yet to have aroused no very intense interest. Until legislative abuses in Massachusetts become greater, or until its advocates agree in urging a public opinion bill which is more conservative and more carefully drawn than that of the past session, there is little prospect of its becoming law.

## PRIMARY VS. REPRESENTATIVE GOVERNMENT

By J. W. GARNER

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The newer institutional forms of democracy—the referendum in its various forms, the initiative, proportional representation, the recall, popular election of United States senators, direct primaries for the nomination of candidates—all indicate the growing self-consciousness of the masses and the demand for a more direct participation in government than the pure representative system allows. Secretary Root's recent declaration that the

whole civilized world is swinging away from its old governmental moorings and entrusting the fate of its civilization to the capacity of the popular mass to govern<sup>1</sup>

is a statement the truth of which needs no proof for its establishment. Still others whose opinions are entitled to consideration are telling us that

the representative system after a century of existence under a very extended suffrage has failed to satisfy the expectations of its early promoters and is likely to make way in its turn for the more direct action of the people on the most important questions of government.<sup>2</sup>

Certain it is that the character of representative government is undergoing fundamental changes not only through the operation of the forms of democracy mentioned above, but also through the new conception of the relation of the representative to his constituency. The earlier conception attributed to the representative full independence of judgment and action, the right to interpret the common need and the common consciousness free from duress either upon his intellect or his conscience. Edmund Burke expressed the old view when he declared that the representative owed his constituent both industry and judgment and when he sacrificed those to the opinion

<sup>1</sup> The *Outlook*, October 20, 1906, p. 409.

<sup>2</sup> Godkin, *Unforeseen Tendencies of Democracy*, p. 144. Substantially the same opinion is expressed by an editorial in the *Outlook* of December 8, 1906, p. 860.

of the constituent, he betrayed rather than served him. But the new view regards the representative in a very different light. He is no longer free to interpret and register the popular will as his conscience and better judgment dictate, but the general consciousness is interpreted for him and he is expected to obey the popular mandate.<sup>3</sup>

In determining the extent to which direct participation of the people in government is practicable or desirable, we must take into account their general intelligence, the character of the service which they are called upon to perform, and the resulting benefits considered from the standpoint both of administrative efficiency and social uplift. If the service consists merely in the selection of those public officials whose offices are political rather than administrative or judicial in character, there is a general concurrence of opinion that a wide popular participation may be safely permitted if the electorate possesses a fair degree of intelligence and virtue. This is so because no special knowledge derived from study, experience or discussion is required to perform the service intelligently and the resulting benefits to the electorate both through education and stimulation of interest in public affairs are of great importance. More important still such participation is necessary to preserve the popular character of the government and prevent it from becoming a bureaucracy.

With regard to popular election of administrative and judicial officers, however, there is no such concurrence of opinion. The result of the democratic movement in this country has been to sweep into its grasp judicial and administrative as well as political offices, until now, with remarkably few exceptions, they are filled by popular choice. In some States the number of elective offices has been multiplied to such an extent that elections have become almost a farce owing to the bewildering number of candidates from whom the voter must make his choice.<sup>4</sup> A reduction of the number of elective officers

<sup>3</sup> "The views of a constituency" says Burgess, "should always be taken into account as contributing to the make up of the consciousness of the State, but the will of a constituency has no place in the modern system of legislative representation." *Political Science and Constitutional Law*, vol. 2, p. 116.

<sup>4</sup> An illustration of this fact was afforded by the election of November 6, 1906, in Chicago. Owing to the great number of offices to be filled at the election, a ballot nearly 2 feet square (26 by 19 in.) was required. There were seven party columns containing the names of 334 candidates. The *Chicago Record Herald* justly complained that there were no electors in Chicago who could vote such a ballot intelligently and urged that it should be simplified by a reduction in the number of elective offices. Horace E. Deming, Esq., in a recent address before

through the adoption of the appointive method for the filling of purely administrative positions would result not only in the selection of a better class of administrative officials, but through a simplification of the ballot, it would tend to elevate the character of the election and render less difficult the exercise of the voting privilege.<sup>5</sup>

If the service of the elector consists in passing judgment upon the merits of untried legislative or administrative projects (as opposed to concrete results already attained), a higher degree of intelligence is, of course required, in the absence of which there must be a loss of efficiency, though the moral and educational benefits to the electorate on account of being permitted to share in the service may outweigh the disadvantage. If governmental efficiency were the only consideration, government by a benevolent despot or by a small body of trained bureaucrats free from popular control would possess obvious advantages over democratic government which, as Sir Henry Maine has observed, is the most difficult of all forms.<sup>6</sup> But it must not be lost

the National Municipal League entered a protest against the useless multiplication of elective offices. He described the ballot used in a recent election in New Jersey as being 2 feet and 8 inches long and containing the names of 164 candidates. He showed how the ballot used could have been simplified by the elimination of at least three-fourths of the names, leaving a small ballot with a dozen or more names. Making so many offices elective, he declared, "confuses the voter as to the real political results, gives abundant opportunity for and, indeed, necessitates slates and combinations, cumbers the electoral machinery adds to the expense, and increases the complexity of campaigns," and at this particular primary, required the printing of 74 names to be passed upon by every voter. The result was that the voter was "hopelessly entangled in the intentional absurdities of the ballot and hence unable to exercise an intelligent and discriminating choice and to make his choice effectual." Proceedings of the National Municipal League for 1906, p. 312.

<sup>5</sup> It is a subject of growing complaint that elections are coming to be too complex for the average voter to exercise his privilege intelligently. The *New York Nation* complaining of this tendency, recently declared that for weeks before the election of November, 1905, the newspapers were turned into primers of instruction for the voters. The spectacle of "educated New Yorkers annually learning how to vote" has come to be one of the regular features of political life in the metropolis. In the election referred to above 13,000 votes were cast for Jerome's republican opponent, although the latter had withdrawn from the race. These votes would doubtless have been cast for Jerome but for the fact that the ballot was very complicated and there was fear that the attempt to vote a split ticket would result in the spoiling of the ballot. Accordingly the electors, voted the straight ticket in order to be sure that their ballot would be counted.

<sup>6</sup> "Of all the forms of government, democracy is the most difficult. Little as the governing multitude is conscious of this difficulty, prone as the masses are to

sight of that governmental efficiency is only one and some writers maintain, the least important end of an administrative system. Professor Goodnow, goes to the length of asserting that

the prime end of all governmental systems should be the cultivation in the people of a vigorous political vitality, a patriotic loyalty and social solidarity,<sup>1</sup>

an end he says which is not attained by a bureaucratic system. Even Bluntschli, who tells us that "among civilized peoples, direct democracy is always a sham," admits that the mass of the people are elevated by participation in public affairs and are distinguished from those who are not permitted to share in the government by a richer and more conscious development of their faculties.<sup>2</sup> It tends to create an active, intelligent and alert citizenship and thereby to promote a higher type of national character.<sup>3</sup> This was one of the principal merits which de Toqueville saw in the democracy of the United States three-quarters of a century ago. The direct participation of the people in legislation, he affirmed, made them acquainted with the laws and instructed them in the art of government. The psychological influence of popular coöperation in government upon the electorate must also be counted as one of the considerations in its favor, since

aggravate it by their avidity for taking more and more power into their direct management, it is a fact which experience has placed beyond all dispute—The difficulties are so manifold and enormous that in large and complex modern societies it could neither last nor work if it were not aided by certain forces which are exclusively associated with it, but of which it greatly stimulates the energy."

*Popular Government*, pp. 87, 98.

<sup>1</sup> *Comparative Administrative Law*, vol. 2. p. 10.

<sup>2</sup> *Allgemeines Staatsrecht*, bk. 6, ch. xxi, Compare Burke's *Reflections on the French Revolution*.

<sup>3</sup> This idea is emphasized by J. S. Mill in his *Representative Government*, ch. iii; "There is no difficulty in showing," says Mill, "that the ideally best form of government is that in which the sovereignty or supreme controlling power is vested in the entire aggregate of the community," p. 21. Direct participation in public affairs, he says, tends to create an "active" rather than a passive type of citizen, human beings rather than machines." Compare Laveleye, *le Gouvernement dans la Démocratie*, p. 273; "No man can be considered free in the political acceptation of the word who is not allowed to take some part in the government of his country." Speaking of the effect of the referendum upon party spirit, A. V. Dicey says: "It is difficult to exaggerate the immense benefit which in the long run accrues to a people from the habit of treating legislation as a matter to be determined not by the instincts of political partisanship, but by the weight of argument." *The Contemporary Review*, vol. 57, p. 508.

popularly enacted legislation is likely to have a moral force back of it which renders its enforcement less difficult. Furthermore, admission of the people to share in legislation tends to pacify the minority, reconcile dissatisfied elements and serve as a sort of specific for social diseases.<sup>10</sup>

But manifestly there is a point beyond which popular government produces an inefficiency which is out of all proportion to the resulting educational advantages to the electorate. When this point is reached the primary system must yield to the representative system. An electorate of average intelligence may very properly be given a veto upon legislative projects of a simple and purely local character, especially if such propositions involve the imposition of extraordinary pecuniary burdens, but it is quite another thing to permit every dissatisfied class in the state to formulate legislative projects which are complex in character and general in scope, compel a referendum on their schemes and have them put into force upon an affirmative vote of an electorate a large proportion of whom, from want of special knowledge are incapable of expressing an intelligent opinion upon the merits.<sup>11</sup>

<sup>10</sup> Compare on this point Common's *Proportional Representation*, p. 334.

<sup>11</sup> "To set to work every group and every interest" says Bradford, "which has a scheme to forward and with the proverbial ease with which signatures are obtained thrust this scheme upon the legislature, to rebound upon the mass of the people for settlement, seems like the evident work of a disordered imagination." *Lessons of Popular Government*, vol. 2, p. 201. Recently, some 50,000 votes were cast in Chicago against a proposition to convert the floating debt of the city into a bonded debt at a lower rate of interest, thus saving thousands of dollars annually to the city. In some instances, propositions of this sort have been defeated outright. An illustration of the queer workings of the referendum was afforded by Maryland in 1891. Two amendments to the constitution were submitted to the voters; one allowing the taxation of mortgage debts, the other altering a clause in the declaration of rights so as to permit a more equitable system of taxation. Apparently, the first proposition should have been rejected and the second adopted. But the result was the contrary, the first proposition being carried and the second rejected, the vote on the question of amendment in each case being about one-third the total vote cast for governor. Strangely enough, some counties were almost unanimous for one amendment and others almost unanimous against it. In some counties, four-fifths of the total vote was cast on one or the other proposal, while in others it was as low as one-sixteenth. The explanation given for the singular result was that the masses not understanding clearly the purport of the proposed amendments voted as the political bosses advised. In the democratic counties, the instructions were to vote a certain way, while in the republican counties, the leaders directed their followers to vote the other way. In some counties where the leaders had no pronounced opinions, one way or other but few votes were cast. Bradford, *Lessons of Popular Government*, p. 561.

Government by the masses in their primary capacity rests on the theory that all men are specialists in a great number of fields, that the mass of ignorant voters, amounting to tens of thousands in the large cities, many of them foreigners recently naturalized and having little or no permanent interest in the community, are as capable of pronouncing judgment upon untried legislative projects or administrative policies as are trained and experienced legislators and administrators, and that they can not be swayed by prejudices or misled by demagogues. The late Mr. Justice Fitz James Stephen expressed a truth which history has abundantly confirmed when he declared that

government really done well requires an immense amount of special knowledge and the steady, restrained, and calm exertion of a great variety of the highest talents which are to be found.<sup>12</sup>

An example of the failure of government by the people in their primary capacity is found in the management of the business affairs of the trades unions in England where an attempt was made to secure to every member a direct share in the conduct of the affairs of his association. The result of half a century's experience has been, so the historians of English trades unionism tell us, instability in legislation, dangerous unsoundness of finance, and general weakness of administration. The initiative was early abandoned and the referendum instead of being extended has been greatly limited in practice.<sup>13</sup>

A recent illustration of the futility of submitting to the people measures of an administrative character which require special knowledge such as is possessed by only a comparatively small portion of the population was afforded by the referendum in Illinois (November, 1906), on a proposition to empower the commissioners of the Illinois and Michigan Canal to sell certain lands belonging to the canal which were described in a certain joint resolution of a previous session of the legislature, the lands to be sold in accordance with the conditions set forth in the said resolution. The voters were left to find out as best they could where the lands were, why it was desired to sell them and what were the conditions of sale referred to in the joint resolution. Not one elector in ten was qualified to cast an intelligent vote on the proposition and it was too much to expect that they would go to the trouble of informing themselves of the merits of the measure through research or correspondence. They did the only natural

<sup>12</sup> *Liberty, Equality and Fraternity*, p. 245.

<sup>13</sup> Sydney and Beatrice Webb, *Industrial Democracy*, chs. i and ii.

thing to be done under the circumstances, namely, abstain from voting on the proposition and accordingly, it was lost by default, though a large majority of those who voted on the measure voted in the affirmative.<sup>14</sup> It is difficult to see what is to be gained either by way of popular education, public control, or administrative efficiency through the employment of the referendum on quasi technical questions of this character when the judgment of the voter is limited to a single yes or no and when there are no practical means of estimating the merits of the measures submitted. A somewhat careful examination of the results of the workings of the referendum both in Switzerland and in this country, shows that the vote cast on referendal propositions has been with rare exceptions, distressingly small, thus raising the question whether after all the masses of the people are really interested in the demand for a wider extension of the referendum and whether if granted, they would avail themselves generally of the privilege. The important constitutional amendment of 1891 establishing the initiative in Switzerland was adopted by a referendum in which less than half of the registered voters participated, and it not infrequently happens that on propositions submitted by the cantonal legislatures, the vote in some communes falls as low as 15 and even 10 per cent of the total. In the canton of Berne, of sixty-eight statutes which owe their existence to direct legislation, only eight were approved by a majority of the voters.<sup>15</sup> In Zurich as many as 30 per cent of the ballots cast are often blank and most of the laws enacted through the referendum so far have been carried by a minority of the voters.<sup>16</sup>

<sup>14</sup> Out of about 900,000 votes cast at the election, 596,000 votes were cast for and against the amendment, leaving 304,000 voters who abstained from recording their judgment on the merits of the proposition. As a result of long continued agitation in Illinois, an advisory vote on the question of amending the constitution so as to permit the employment of the initiative in legislation "thereby restoring to the people the power which they once had, but which they delegated to the general assembly by the constitution," was taken in 1902. About 50 per cent of the vote of the State was cast in favor of the proposition, but according to one observer, many of those who voted in favor of the proposition did not know what it meant and among them were many business and professional men; some thought they were voting for the referendum instead of the initiative; while thousands of laboring men voted in the affirmative not because of any opinion which they entertained regarding the merits of the initiative, but because the word had been passed around from the "union" to vote for the proposition. Brown, *The Initiative in the American Journal of Sociology*, May, 1905.

<sup>15</sup> Arthur S. Hardy, *The Independent*, June 13, 1907, p. 1408.

<sup>16</sup> E. V. Raynolds, *Yale Review*, vol. 4, p. 290.

It is ridiculous, says Deploige, a native student of the referendum in Switzerland, to talk of legislation by the people when more than half of the citizens refuse to exercise their legislative rights.

American experience with the referendum has in general shown the same indifference and apathy. Only in exceptional cases have constitutional or legislative proposals called out a vote equal to 50 per cent of the total and in most cases it has been less. Owing to the common requirement that proposed constitutional amendments shall, in order to be valid, receive a majority of the votes cast at the election at which the amendment is submitted, it has proved impossible to bring about needed constitutional changes in many of the States. To mention a few examples, by way of illustration, an important amendment to the constitution of Illinois, the need of which scarcely any one denied, was defeated in 1896 because only about one-fifth of those who voted for presidential electors cast a vote on the question of amendment.<sup>17</sup> In November, 1906, a proposed amendment was submitted to the voters of Kansas and only 60,000 votes were cast on the proposition though more than 300,000 votes were polled by the head of the State ticket. Practically all attempts to amend the constitution of Indiana have resulted in failures on account of the indifference of the voters. In November, 1906, a much needed amendment to which there was little opposition, was submitted to the voters of that State and it had the singular fate of being voted on by only one-twelfth of the voters who went to the polls.<sup>18</sup> Where a majority of those voting on the proposition to amend is sufficient to adopt, it sometimes happens that amendments are carried by a small minority of voters. This happened in Louisiana in November, 1906, where several important amendments were adopted by a vote of one-sixth of the electorate.

Experience with the referendum on State statutes and municipal questions shows less indifference on the part of the voters, but with rare exceptions, the abstentions are more numerous than the votes cast, so that the results often represent the opinions of the minority rather than of the majority.<sup>19</sup>

<sup>17</sup> The total vote cast at the election was 1,090,869; the vote on the question of amendment for and against was 239,576.

<sup>18</sup> The total vote cast was 600,000; on the question of amendment 51,000.

<sup>19</sup> Recently in Buffalo only 9641 votes were cast on a proposition looking toward the establishment of a municipal lighting plant. In Boston in 1894, the popular vote on the rapid transit question was less than one-third of the total vote cast

Of all municipalities in the country, Chicago has had perhaps the most satisfactory experience with the referendum and the results there have been such as to encourage the belief that direct legislation within proper restrictions may be practicable under modern urban conditions. During the last five years, the electors of that city have been called upon to pass judgment on not less than fifteen propositions of State or municipal policy and in almost every case, an intelligent use has been made of their power. Furthermore, what is remarkable when compared with the experience of other cities, the proportion of votes cast on the various questions submitted aggregated in most cases about two-thirds of the total vote cast at the election and in a few instances, the proportion was considerably larger, thus showing an absence of that popular indifference which in so many other places has led to a practical breakdown of the referendum. But for the most part, the questions upon which the referendum was taken related to municipal policies in which all classes of the people felt a deep personal interest, and since the vote in each case was preceded by a campaign of education by the advocates and opponents of the various measures submitted, it was not unnatural that large votes should have been polled. But where propositions were submitted which were semi-technical in character, which had a general rather than a local interest, and which were not elucidated by public debate and discussion, such for example, as the proposition to enable the commissioners of the Illinois and Michigan Canal to sell certain lands, popular interest was slight and the propositions were defeated by default rather than by opposition. We may conclude, therefore, that a limited use of the referendum may be desirable in the interest of popular control and political education, but rarely for administrative efficiency. If applied to simple questions of public policy of a purely local character in which the masses of voters have a personal interest such as they have in the choice of public officers, the referendum may subserve a useful purpose both by way of restraint upon the government and by way of popular education and stimulation of interest in public affairs. But in general application to large districts and to general questions of legislative policy or to quasi technical questions of an administrative character, the referendum has no

and the question was finally settled by less than one-sixth of the electorate. Within the last few weeks, the question of introducing the commission plan of government in Wichita, Kansas, was settled by a referendum in which only 4500 voters out of a registered electorate of about 13,000 persons took part.

place and can only lead to results which are worthless if not mischievous.

On the whole, experience with the initiative and referendum shows that their use, particularly for the determination of questions of administrative policy, should be restricted rather than extended. The growing disposition to take a referendum on every question of public policy upon which there may be a difference of opinion, strikes at the root of efficient business-like administration. The practice of taking a referendum on several questions at the same time at which an election of officers is held greatly complicates the election, confuses issues of policy with personal issues and leads to results which do not represent the popular will.<sup>20</sup> This is the testimony of the election commissioners of Chicago where this practice has caused considerable dissatisfaction. To provide separate elections, however, in order to simplify matters and permit independent judgments on the measures submitted would, of course add greatly to the expense of holding elections in addition to the loss of time and the demoralization incident to an election. In most States there are already too many elections (Illinois is a notable example) and any proposition which contemplates an addition to the list is subject to serious objection whatever may be its merits in other respects.<sup>21</sup> It is not at all unlikely that we shall soon witness a reaction against the present clamor for more direct government by the masses. The idea of the right of everybody to take part in public affairs by proposing laws for the good of the country has an attractive ring to it, but in practice, says Professor Lowell, it has not proved of value.<sup>22</sup> The same judgment must be expressed with regard to the use of the referendum, except where it is employed in accordance with the restrictions and conditions indicated above. The representative system, with all its faults, will sooner

<sup>20</sup> At a recent election in Portland, Oregon, twenty-one propositions were submitted to the voters. The results illustrate the dangers of popular legislation. A gas franchise for twenty-five years was approved in spite of the opposition of the best informed students while propositions for moderate increases of compensation for certain city officials were voted down.

<sup>21</sup> The supreme court of Delaware speaking of the referendum said: "The frequent and unnecessary recurrence of popular elections, always demoralizing in their effects, are among the evils that can befall a republican government; and the legislation dependent upon them must be as variable as the passions of the multitude, *Rice v. Foster*, 4 Harr, 479.

<sup>22</sup> The Referendum and Initiative, *International Journal of Ethics*, vol. 6, p. 55.

or later come to be better appreciated as the glaring defects of direct legislation become more manifest. If there be one principle clearer than another, says Woodrow Wilson, it is this: that in business, whether of government or of mere merchandise, somebody must be trusted. Power and strict accountability are the essential constituents of good government.<sup>23</sup> Jefferson, whom the friends of the initiative and referendum never cease to quote in support of their schemes, saw that government was practicable only when carried on by a comparatively few men. There is a natural aristocracy, he said, founded on talent and virtue which seems destined to govern societies; and of all forms the best is that which provides for the introduction of this class into the government.<sup>24</sup> Lecky in his *Democracy and Liberty* has pointed out the dangers of government by those whom he calls the

"poorest, the most ignorant, the most incapable who are necessarily the most numerous." Such an idea, he says, "reverses all the past experience of mankind." "In every field of human enterprise," he continues, "in all the competitions of life, by the inexorable law of nature, superiority lies with the few and not with the many, and success can be obtained by placing the guiding and controlling power mainly in their hands."

<sup>23</sup> *Congressional Government.*

<sup>24</sup> Quoted by Signorel, *Étude de législation comparée sur le Referendum Légitif*, p. 22. Signorel concludes after an elaborate study of the working of the referendum in Switzerland that it is not practicable, that it has proved an obstacle in the way of good legislation and has been responsible for much unwise legislation. He declares that the people are unfitted to legislate themselves and if permitted on a large scale, it will lead to tyranny and the ruin of liberty, p. 458.

## INFLUENCE OF THE PRIMARY ELECTION UPON PARTY ORGANIZATION

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We are now in the midst of the third period of radical party readjustment to new governmental conditions, and I am requested to forecast the probable effects upon party organization. The readjustment which we are now experiencing is clearly in response to a popular demand. In the two earlier instances there were likewise elements which were adapted to popular needs.

Even the legislative caucus, in State and nation, which was the first form of organization for the two great national parties, met an obvious need. The voters were already divided into two main groups of opposing opinions and party names had been assumed. Some means were required to give effect to party opinion. The voters were widely distributed. Communication was slow and difficult. At each State capital, and at the national capital, there were already gathered law makers chosen by the people of each locality. It was in entire harmony with the needs of the period that these representatives should assume and exercise the added function of making party nominations. It was, however, only for federal, State, and district offices that the legislative caucus made nominations. For the smaller areas—towns, cities, and counties—other methods were employed.

The legislative caucus was always subject to criticism. Its action was viewed by many as an unauthorized assumption of power. Only in the absence of other more direct organs for giving effect to party opinion was it acceptable. Out of the experience of towns, cities and counties a more direct nominating process was gradually developed for the wider areas. It was customary to choose delegates in local party caucus to meet in party convention, to formulate party policy, and to nominate candidates. In time, and in accordance with the popular wish, the delegate convention system was so extended as to wholly displace the legislative caucus. With the advent of the convention there has come into existence a vast array of party machinery, in the form of permanent party committees. In its origin this ma-

achinery answered a real need. The voters were still widely scattered and communication was still slow and difficult. The loosely constructed system of local, State, and general government tended also still farther to separate and divide the people. In the beginning the party conventions and the party committees were effective organs for resisting disintegration and promoting national unity.

While the system of party machinery has grown, there has come into use the railway, the telegraph, the telephone, and rural postal delivery. By means of the daily press the people of the State, of the entire nation, are brought together. There is thus made possible a sort of daily session or town meeting for the whole body politic. Party organs, which in their origin were eminently serviceable, are no longer needed to bring the people together. As the newspaper and other agencies for easy and direct communication have become universal, the discarded or neglected party machinery has fallen into the hands of vested interests, whose use of our political agencies is often adverse to the public good. This condition has given rise to the present effort for the readjustment of party machinery. Direct nominations at primary elections are being substituted for the nominating conventions.

The first and most obvious change, therefore, is the tendency to eliminate the nominating convention. How far this will go is as yet only a matter of conjecture. Thus far the nomination of candidates for the presidency by popular vote has not been seriously considered, but provision is made in many States for the popular election of delegates to the national convention. Since the general government has no machinery for holding elections, the national nominating convention is likely to endure so long as distinctly party nominations are made.

The system of party conventions has served other purposes than the nomination of candidates. It has assisted in the formation and expression of party issues. The convention has given rise to the party platform. If there is no State convention, how can there be a State platform? There exists a strong tendency to retain the State convention even though its nominating function be lost. Yet, as voters become accustomed to the new nominating process, the party platform is likely to emanate more and more directly from the utterances of the successful candidates. In a State, therefore, where many nominations are made for a variety of functions, there will be little use for a State party platform.

Our system of permanent party committees also grew out of the convention. With the passing of the convention many of the functions of the committee will disappear. The party may still maintain agents to look after registration and to guard party interests at primary elections. The functions of the campaign committee will remain. Yet even here the new method is likely to effect important changes. As the party platform passes from the convention to the candidate, so the party committee is likely to become more and more an agency of the candidate.

A more important change to be effected by the primary election is found in the distinction which it enforces between State and federal polities. The earlier system of party conventions with its vast array of party machinery tended to obliterate the distinction between State and nation. The two governments which the constitution makes distinct were, in the hands of party committees, fused together in such a way as to render intelligent action on the part of the voter difficult or impossible. The new system enforces a separation and compels a distinction between State and federal polities. The convention system and the existing national committees still serve in the management of federal polities, while in the States a radically different system is adopted. This in itself enforces a difference and a contrast.

The new method also furnishes the means for partially removing the one instance of capital maladjustment in our Federal Constitution. I refer to the provision for the election of United States senators, which has resulted in compelling the voter, in a single act, to attempt the impossible task of expressing an opinion on the policies of two governments which the Constitution makes distinct. When he votes for men to make laws for his State, it is a mere accident if these men represent his views in national politics. Through the device of a primary election it has been found possible virtually to relieve the State legislature of the responsibility of selecting United States senators. This makes it possible to develop and maintain distinct and independent policies in the States.

The primary election has not come alone. The referendum and the popular initiative are important attendants. These new agencies together are likely to have far-reaching effects upon the party system. There has ever been a considerable body of citizens who have been opposed to anything like corporate and responsible party government. This opinion has persisted for a hundred years.

It has been strengthened by the obvious abuse of the party machine fallen into the hands of vested interests. The question is therefore seriously raised whether the continuance of what has been known as party government is desirable. This is a question of a different order from that of mere change in organization. It involves consideration of the discarding of the old political agencies and methods. It is maintained that the people no longer need an organic corporate body to serve as an intermediary between themselves and their government. If, as incident to present popular movements, this view should prevail, the party, in the old sense of the word, would drop out of use. Party names might survive but they would denote groups of voters devoted to special interests and opinions. They would no longer designate organizations assuming the responsibilities of government.

## SOME DISPUTED POINTS IN PRIMARY ELECTION LEGISLATION

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The widespread interest in nominating systems, particularly during the last ten years, has given rise to a great number of problems new to American politics. These questions are puzzling the reformer, the practical politician, the lawmaker and the judge. They are of absorbing interest to the student of political institutions and tendencies. It is the purpose of this paper to discuss only three of these problems, namely: the test of party allegiance, the formation of the platform under the direct primary system, and the majority required for nomination.

As the party primary becomes more and more like an election, the more important does the question of party membership become. What constitutes a republican or a democrat? and how shall a satisfactory legal test be made? Originally this was a matter over which the party authorities possessed exclusive jurisdiction, and which they might regulate and control in their discretion. The republican committee decided what evidence was necessary to establish a right to participate in republican primaries, and the democratic committee defined and determined the essentials of democracy. The abuse of this power in many cases led to legal regulation of the party test. The most frequent test required is an expression of intention to support the party candidates in the ensuing election, coupled with a statement of past support of or affiliation with the party. In Michigan the test includes a declaration of sympathy with the objects of the party.<sup>1</sup> In New Jersey, the voter must state that he supported a majority of the party's candidates at the last election, and intends to support the candidates named in the primary.<sup>2</sup> South Dakota requires previous support of the party, belief in a "substantial part" of principles of the party, and intention to support the candidates

<sup>1</sup> Ch. v, sec. 9, 1905.

<sup>2</sup> N. J., 1903, ch. 248.

nominated.<sup>3</sup> Pennsylvania requires a declaration that the intending voter supported a majority of the party's candidates at the last election.<sup>4</sup> The Missouri law of 1901 merely required that the voter answer affirmatively the question

Are you a ——?<sup>5</sup>

In some cases an attempt is made to bar those who have already signed a nominating petition, or *vice versa* to prevent those participating in a primary from subsequently signing a petition. In Rhode Island<sup>6</sup> it is provided that no person shall be entitled to vote

who shall have signed nomination papers of candidates for any elective office to be voted for at the same election as that for which such caucus is being held;

and also that names of those who have participated in any party primary within 90 days, shall not be included in the number necessary to place a name upon the ballot by petition. (Sec. 6.) A similar joker is contained in the Illinois law of 1906,<sup>7</sup> preventing any one from participating in a primary after having signed a petition of another party or of an independent candidate or from signing a petition after having taken part in a primary. Like provisions are found in other States.

In the Southern States, the general practice is still to leave the determination of the party test to the party officers, although the present tendency is somewhat away from this. A minimum requirement may be embodied in the law, but the party is permitted to add to this in its discretion.<sup>8</sup> The Mississippi law of 1902 requires the voters to declare that they intend to support the nominations in which they participate, have participated with the political party holding the primary within the two years preceding and are not excluded from such primary by regulations of the party State executive committee.<sup>9</sup> In Louisiana the voter must declare whether or not he is a member of such political party and whether he will support the nominees of said primary election.<sup>10</sup> In the act of 1900 the

<sup>3</sup> S. D., 1905, ch. 107.

<sup>4</sup> Pa., 1906, ch. 10, sec. 10.

<sup>5</sup> Mo., 1901, p. 149, sec. 18.

<sup>6</sup> 1899, 662, sec. 11.

<sup>7</sup> 1906, p. 450, sec. 33; La., 1900, ch. 33, sec. 15; Minn., 1903, ch. 90.

<sup>8</sup> See Tenn., 1901, ch. 39; La., 1906, ch. 49.

<sup>9</sup> Miss., 1902, ch. 66, sec. 9.

<sup>10</sup> La., 1900, ch. 133; 1906, ch. 49, sec. 10.

voters were required to declare that they would not accept appointment from any other party within four years. But additional qualifications may be required by the State central committee. In Florida, however, the party authorities are given complete power to prescribe the terms upon which voters may participate in the primaries, and in no Southern State during this period has the party been deprived of the power to exclude undesirable persons from the primary. The law has laid down minimum requirements, but permitted the party to make its own maximum.

As the question of party suffrage has occupied the attention of legislators for the last ten years, so the registration of party voters has become one of great interest. Starting with no lists at all, advancing to informal party lists, then on to the regular registration books used in the general elections, we find in the latest period the system of party registration introduced. A number of States have provided for such a system: Kentucky in 1892; New York in 1898; Nebraska in 1899; South Carolina in 1900; North Carolina and Connecticut in 1901; Maine and New Jersey in 1903; Iowa, Oregon and Vermont in 1904; and Michigan in 1905 are among the number. The character of these provisions is much the same in all States. At the time of registration the voter is given an opportunity of declaring his party affiliation, if any, which is then indicated in a column of the registry book. A list of party voters is then made up from these preferences, and this serves as their registry list for the ensuing primary election. In New York the declaration of affiliation is secret and the names are not disclosed until after the general election, when the lists are thrown open, and in New York City are printed.

In Maine the declaration of affiliation may be filed with the town clerk.

I —— being a legal voter of —— hereby elect to be enrolled as a member of the —— party.<sup>11</sup>

In Vermont, a certificate is given to voters, reading as follows:

It is my intention to act and vote with the —— party at the coming election. <sup>12</sup>

This certificate may be attached to the inventory for tax purposes, but is furnished all voters, whether tax-payers or not. If the voter does not return the certificate, he is ineligible to vote in the caucus,

<sup>11</sup> 1903, ch. 214, sec. 2.

<sup>12</sup> 1904, ch. 2, sec. 4.

In North Carolina and South Carolina the registration provided is to be made entirely under party rules and regulations. The law merely requires that there shall be some system of registration.

In such laws, provision is made for transfer of enrollment from one district to another upon change of residence; and in New York for a number of years a supplementary enrollment was provided. This latter has, however, been abolished.

In a very few instances during this period, the party test has been abolished altogether. The California law of 1899 contained a provision which enabled the voter to cast a ballot for either party, without divulging his party preference. This clause was subsequently declared unconstitutional, however.<sup>13</sup> A similar provision was contained in the Oregon law of 1901, which was also declared unconstitutional. The Minnesota law of 1899, provided for the open primary, but in 1901 this feature was abandoned. In the Wisconsin law of 1903, absolute secrecy of the ballot is secured, and the voter may vote for candidates of whichever party he may choose. Of course, he cannot vote with both parties at the same time.<sup>14</sup>

It is urged in favor of this plan that it protects the secrecy of the ballot; that it makes intimidation or undue influence impossible; that the requirement of a partisan test is both unnecessary and useless; and that the test of allegiance excludes only the honest citizen while admitting the dishonest and corrupt. It is objected, however, that without some sort of party test, the responsibility of the party for the character of the nominations made or of the platform adopted is entirely broken down. Members of the republican party may assist in the nomination of weak democrats, or *vice versa*; and unscrupulous leaders may readily transfer blocks of voters without regard to party lines. When a corrupt machine is threatened by the nomination of an aggressive reformer, it is possible to avert this menace by the use of available numbers of the other machine. In these ways, it is held, the responsibility of the party may be completely destroyed, or, at any rate, seriously crippled, and reform movements may be made more difficult.

On the whole, if any test is required, it would seem sufficient to exact from the voter a statement that he is in general sympathy with the principles of the party and that he intends to support its

<sup>13</sup> See *Britton v. Board of Election Commissioners*, 61 Pac., 1115, 1900.

<sup>14</sup> Where the commission plan of government is adopted in Iowa, a non-partisan primary is provided. Iowa, 1907, ch. 48. See also Wisconsin, 1907, ch. 670.

candidates generally at the next election. This eliminates the period of probation and permits the voter to pass freely from one party to the other as conditions or circumstances change. The system of party enrollment or registration seems to lay undue stress on the rigidity of party organization, although this may be to some extent offset by liberal provisions for supplementary enrollment or change of party registration. The chief objections to this system would then disappear, but also its chief merit, namely, that of keeping out the unwelcome and unscrupulous invaders of the party. This illustrates very well the inherent difficulty in all tests, namely, that of letting down the bars for the honest, independent voter without admitting, at the same time, the dishonest and the venal. It appears, then, that no solution of the problem of party test has yet been reached and that much more practical experience and much more mature reflection will be necessary before the proper sort of a regulation can be devised.

✓ In framing direct primary laws, an important problem arises in connection with the formation of the party platform. With the abolition of the delegate convention, the representative body of the party, how shall the declaration of party principles be drawn up? What shall be substituted for the present authority? How shall the declarations of such an authority be made binding? In local areas, where direct primaries have chiefly been tried and where differences in principle are rare, the question of the platform has not occasioned serious trouble. In larger districts, like States, however, the question becomes more important for, although distinct State issues are not so common as State campaigns, there are occasionally serious divisions of opinion in State elections and for such emergencies provision must be made in the law.

Several answers have been given in the various States. In Wisconsin provision is made for the formation of a State platform by a candidates' convention.<sup>15</sup> This body is made up of all the party candidates for State office and for the legislature, together with the hold-over members of the State senate. In this way members both of the legislative and the executive departments may be committed to a definite party policy, and this party policy formally presented as the platform. In Missouri the law provides for the formulation of the platform by the State central committee acting with the party nom-

<sup>15</sup> 1903, ch. 451.

inees for State office, for congress, and for the legislature.<sup>16</sup> In North Dakota the platform is framed by the State central committee with the candidates for State office.<sup>17</sup> Still another method is found in Nebraska, where each county committee elects one delegate and the delegates so chosen meet and frame the party platform.<sup>18</sup> In Texas another plan is provided.<sup>19</sup> On petition of 10 per cent of the party voters, any question of policy must be submitted to the voters of the State at the primary and, if approved by a majority, becomes a part of the platform of the party. It is also provided that no convention shall place in the platform or resolutions of the party they represent any demand for specific legislation on any subject, unless the demand for such specific legislation shall have been submitted to a direct vote of the people, and shall have been endorsed by a majority vote of all the votes cast in the primary election of each party. Provision regarding a party referendum was contained in the Oregon law of 1901.<sup>20</sup>

More commonly, however, the platform is formed by the candidate or candidates themselves. This is the general method employed in local campaigns throughout the South, and in the State campaigns of Washington and Oregon in the North. In the Oregon law, express provision is made for declaration by the candidate of the principles upon which he stands in not exceeding one hundred words and twelve words are permitted to be printed upon the ballot.<sup>21</sup> But where no legal provision is made for such a declaration upon the ballot, the candidate may of course make such a statement the basis of his campaign. The shaping of the platform by the candidate seems, all things considered, best fitted to survive. Where there is a serious difference of opinions as to policies, the platform is likely under any system to be shaped by the dominant group and will be practically the program outlined by this faction in its fight before the primary election. Generally such issues are as clearly and as sincerely defined during the primary as they would be in the platform framed by

<sup>16</sup> 1907, p. 263.

<sup>17</sup> 1907.

<sup>18</sup> 1907, ch. 52.

<sup>19</sup> 1907, ch. 177.

<sup>20</sup> See Nebraska, 1907, ch. 52, sec. 35.

<sup>21</sup> 1904, sec. 12—"If I am nominated and elected, I will, during my term of office (here the candidate, in not exceeding one hundred words, may state any measure or principle he especially advocates and the form in which he wishes it printed after his name on the nomination ballot, in not exceeding twelve words.)

convention, for it should not be forgotten that the average party platform is verbose and perfunctory and often serves no real purpose, since the elections are usually conducted upon the basis of national issues. Where there is no living issue of a local character, it is not likely that the question will be obscured or befogged because of the failure of the party convention to elaborate its position on other questions.

In case definite machinery is provided, the Wisconsin plan seems to possess some merit. The party program is made, under this system, by those who, if elected, are to carry it out; and the majority might reasonably be held to bind the minority. The platform is made after the candidates are chosen, however, and in case of an unwilling candidate, there would be no effective way of securing acquiescence in the program, either before or after the election. As compared with a platform framed either wholly or in part by the party committee, the candidate convention is far superior. Party committeemen are chosen to manage campaigns and conduct organization business, and not for their opinions upon questions of public policy or their ability to frame statements of public policy.

Under a system which provides for the selection of candidates by direct vote, the percentage of the total vote necessary for a choice is a subject of considerable importance. The common plan throughout the North and West is to require merely a plurality vote. The candidate receiving the highest number of votes is made the nominee. In the Southern States a clear majority is usually required and when no candidate receives the necessary vote, a second primary is held, in which the two leading candidates participate.<sup>22</sup> As another alternative, it may be provided, as in Illinois<sup>23</sup> (1905) that in case no candidate receives a majority of all the votes cast, a convention shall then make the selection. In recent years, provisions have been made requiring the candidate to secure a minimum percentage of the votes cast; thus in Michigan, 40 per cent is required, in Iowa 35 per cent. Under the Michigan plan, if 100,000 votes are cast, there is no nomination unless some candidate receives at least 40,000 votes. If no choice is made then the convention must select the candidate.

<sup>22</sup> See also Michigan, 1905, ch. 476; special acts:

<sup>23</sup> Applied to county offices, 1905, p. 227; In North Dakota, 1907, no nomination is made unless the total vote cast for candidates for a given office equals thirty per cent of the total party vote for secretary of state at last election.

Finally, a system of preferential vote has been advocated. Under this plan the voter indicates his first and second choices for the office and, in case no candidate receives a majority of first choices, the lowest candidate is dropped and his second choices are then distributed. This plan has been approved in Wisconsin by Governor LaFollette, but not accepted by the legislature. A modified form of it has been adopted by the State of Washington in 1907. Where there are more than four candidates for a State or congressional office, each voter is required to indicate first and second choice. If no candidate receives 40 per cent of the total vote, second choices are then counted in and a decision reached in this way.<sup>24</sup>

In the South the second primary, necessitated by the requirements of a majority for nomination, occasions no particular difficulty and the system appears to work very well. As there is really but one party and as the regular election is generally perfunctory, the second primary is usually well attended. In fact, this second primary, when held, is in reality the election. In other sections of the country, where the party system is in vogue, it is not likely that the second primary is practicable. The number of elections is already so great that an additional primary would probably be poorly attended and the results unsatisfactory. The difficulty of securing a full and representative vote is already so formidable that no new complication should be added. In many instances, the second primary would involve the holding of two primaries and an election in the spring, followed by two primaries and an election in the fall;—a situation which seems to favor the professional politician, rather than the general public.

Choice by convention, in case no candidate receives a majority, is a compromise favored by those who believe that in this way the advantages both of the direct vote and of the delegate system may be retained. Where there is a strong sentiment in favor of any candidate, it is argued, he will be nominated, while the advantage of the deliberative body or convention will be preserved. On the other hand, it may happen that a candidate will fall slightly short of the necessary majority, and, although far in the lead of his nearest competitor, secure relatively few delegates, and fail to be chosen by the convention. There is also danger that candidates may be presented

<sup>24</sup> Laws of 1907, ch. 209, sec. 18 and 23. In Alpena county, if no candidate receives 25 per cent of the vote, a second primary is held; 1905, ch. 476, special acts.

with the deliberate purpose of so splitting up the vote that no one of them will receive a majority and that the choice will consequently devolve upon the convention.

The preferential system is designed to obviate the necessity for a second ballot and at the same time to prevent the choice of a candidate by plurality only. It is also intended to meet cases where a majority as to a policy is divided as to a candidate, and is likely to be overridden by a minority united on a single candidate. Thus an anti-machine group may muster 50,000 votes as against 30,000 machine supporters, but if the reform votes are divided between the two candidates, the solid vote of the organization will place the candidate of that faction in nomination. The preferential system is somewhat complicated, however, especially where two or more candidates must be selected for the same grade of office,<sup>25</sup> and is not likely on this account, to win very general opinion. The ballot is still somewhat of a mystery to the general public and additional requirements are not likely to meet with general favor. It seems likely that the public will accept the plurality system before it is reconciled to the complications of the preferential plan.

A plurality system may at times embarrass a reform movement which possesses more candidates than the "machine," but the preferential system would enable the opposition to work mischief in the distribution of second choices. Rivalry and jealousy might easily be fostered and choice actually made between two promising reformers by the machine. If, for example, A, the machine candidate, has 5000 votes, and B and C, reform candidates, 4000 each, the second choices of the machine group might nominate either B or C.

The most common method of nomination is the choice by simple plurality vote. This is the ordinary method outside of the Southern States, and, in general, has proven satisfactory where employed. The objection frequently urged is that it makes possible the choice of a candidate by a small faction of the party decidedly in the minority. If there are six candidates, for example, and the vote is somewhat evenly divided, it is possible that the highest candidate may receive not more than 17 per cent of the total vote cast. Thus 17,000 votes out of 100,000 might choose the party candidate. In short, the argument is that there is not a sufficient guarantee that the successful candidate really commands sufficient general support in the party

<sup>25</sup> Nomination of representatives in Illinois, aldermen in Boston, etc.

to warrant his choice as its representative. Where the system has actually been employed, however, these objections are not generally held. In practice the result of the primary is accepted by the several contestants with as good grace in the case of a plurality as of a majority. The number of candidates is, as a rule, not so great as might be expected and, where any really important issue is involved, the list is likely to be narrowed down to two. Where there is no overshadowing issue and the sole question involved is the personality of the candidates, a plurality nomination need not arouse any antagonism or division in the party.

A modification of the plurality system is the minimum percentage plan now used in Michigan where 40 per cent is required for governor and lieutenant-governor, and in Iowa where 35 per cent is necessary to a choice. In both cases, nomination by convention is the alternative. This plan is open to the same objections as apply to the majority scheme, namely the possibility that the leading candidate at the polls may be beaten in the convention; and that dummy candidates may be put up for the purpose of so dividing the vote that choice must be made by the delegates. The lower the percentage, however, the less is the likelihood that choice will not be made by the voters in the primary and the less the opportunity for such manoeuvres.

On the whole, it seems probable that the simple plurality will probably be adopted outside of the Southern States, where peculiar conditions prevail. Experience has shown that this is a satisfactory system, and that it neither destroys nor disrupts the party. The demand for a majority primary or a minimum percentage is generally based on unfounded apprehension, rather than upon reason or experience. It ignores the fact that the number of candidates under the direct primary system is not ordinarily great and that where the number is large the custom soon teaches acquiescence in the nomination of the leading candidate in the primary just as it does in the general election. Originally choice by majority vote only was the general rule, even in elections, but now a plurality is accepted and indeed never challenged. It is likely that the same process of development will take place in the party primary.

## THE DES MOINES PLAN OF CITY GOVERNMENT

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Since the discussion this afternoon centers about the newer institutional forms of democracy, I shall not in this paper attempt to exploit the Des Moines plan of city government as a method of municipal reform or as a solution of the problems of city administration. My purpose will be simply to point out such of the newer institutional forms of democracy as are expressed in "An act to provide for the government of certain cities," recently passed by the general assembly of Iowa and applicable to all cities of the first-class in that State, having a population of 25,000 or over.

Having been originally brought forward and urged by the people of the city of Des Moines, the system of government outlined in the act of the general assembly has come to be known generally as "The Des Moines Plan of City Government." It has already been adopted by two of the leading cities of the State, namely; Des Moines and Cedar Rapids—but organization under the new system has not yet been effected in either place.

The Des Moines plan is of course not an altogether unique system of municipal government. It is simply a new edition of the more familiar commission plan; or, it is the Galveston plan revised. Briefly it provides for the government of the city by a council consisting of a mayor and four councilmen who are vested with

all executive, legislative and judicial powers and duties now had possessed and exercised by the mayor, city council, board of public works, park commissioners, board of police and fire commissioners, board of water-works trustees, board of library trustees, solicitor, assessor, treasurer, auditor, city engineer, and other executive and administrative officers in cities of the first-class.

Furthermore, the executive and administrative powers and duties are distributed among five departments designated respectively as: department of public affairs; department of accounts and finances; department of public safety; department of streets and public improve-

ments; and department of parks and public property. And, moreover, each member of the council is required to serve as superintendent of a department.

The members of the council are chosen by the electorate of the city. But all other officers and assistants (including a city clerk, a solicitor, an assessor, a treasurer, an auditor, a civil engineer, a city physician, a marshal, a chief of fire department, a market master, a street commissioner, and three library trustees) are elected or appointed by the council and subject to removal at any time by the same authority. It is also provided that the council shall appoint three civil service commissioners who under the direction of the council are required to perform the usual duties prescribed for such civil service commissioners.

Turning now to the newer institutional forms of democracy as expressed in the act of the general assembly of Iowa the following deserve mention:

1. Upon the petition of twenty-five per centum of the voting electorate the Des Moines plan of government is submitted in cities of the first-class to a direct vote of the people for adoption or rejection. And similarly upon petition a vote may be secured upon abandonment of the plan at any time after it has been in operation for six years.
2. The mayor and four councilmen are nominated by a general non-partisan primary election, that is, they are nominated by the electorate at large at a primary election in which ballots are used containing no party marks whatsoever. And these same officers are elected biennially at large, that is, on a general ticket.
3. The members of the council may be removed or recalled at any time by the electorate. For it is provided that upon the petition of twenty-five per centum of the voting electorate the question of the removal of the incumbent of any elective office is submitted to a direct vote of the people.
4. Proposed ordinances may be submitted to the council through petition from the electorate; and such proposed ordinances, if not passed by the council, are submitted without alteration to a direct vote of the people. Furthermore, ordinances proposed by petition or which have been adopted by a vote of the people may not be repealed or amended except by a vote of the people.
5. No ordinance passed by the council (except in certain cases particularly mentioned) "shall go into effect before ten days from the

time of its final passage;" and if during said ten days a petition signed by at least twenty-five per centum of the voting electorate is presented to the council protesting against the passage of such ordinance the same shall be suspended from going into operation and it shall be the duty of the council to reconsider such ordinance, and if the same is not entirely repealed it shall be submitted by the council to a direct vote of the people.

6. "Every ordinance or resolution appropriating money or ordering any street improvement or sewer, or making or authorizing the making of any contract, or granting of any franchise or right to occupy or use the streets, highways, bridges or public places in the city for any purpose, shall be complete in the form in which it is finally passed, and remain on file with the city clerk for public inspection at least one week before the final passage or adoption." Moreover, "every franchise or grant for interurban or street railways, gas or water-works, electric light or power plants, heating plants, telegraph or telephone systems or other public service utilities within [the] city, must be authorized or approved" by a direct vote of the people.

7. All meetings of the council at which any person not a city officer is admitted shall be open to the public.

8. The council is required each month to print in pamphlet form for distribution a detailed itemized statement of all receipts and expenditures of the city along with a summary of its proceedings during the preceding month. And at the end of each year the council shall provide for a complete examination of all books and accounts of the city by competent accountants and shall publish the results of all such examinations.

Thus it is seen (to summarize) that in the Des Moines plan of city government the democratic idea of government in accord with the will of the people has been institutionalized by *first* centralizing all powers and authority in a council of five men and *then* making that council directly responsible and accountable to the electorate for the faithful performance of their duties in accordance with the desires of the people through these newer institutional forms of democracy, namely:

1. The non-partisan primary.
2. The election of officers at large, i. e., on a general ticket.
3. The recall.
4. The initiative.

5. The referendum.
6. The veto or protest.
7. The publicity of all business.
8. The expert examination of all books and accounts.

## RESULTS OF THE INITIATIVE AND REFERENDUM IN OREGON

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In writing this paper for The American Political Science Association, I beg first to correct the statement that I am speaker of the Oregon assembly. I never held that office and it is more than ten years since I was a member.

The every day use of a new piece of machinery under working conditions is the best test of its value. Therefore I shall mention briefly some results of five years use of the initiative and referendum in Oregon.

The whole number of electors voting at general elections since 1902 varies from about 93,000 to 97,000. The number voting on measures is from 67 to 89 per cent of the highest number voting for officers. The smallest majority by which any measure has been approved was 3118 and the largest was 64,512. The smallest majority by which any measure has been rejected was 9747 and the largest was 13,000. Woman suffrage and the local option law received the highest percentages of votes, showing that men do not vote on questions they do not understand. Very few men confess ignorance on either of these questions.

The legislature of 1903 appropriated money to build a portage railroad on the Columbia River to extend the water transportation service. Railroad men circulated a referendum petition against the bill, whereupon the Portland chamber of commerce resolved that if the petition was filed it would propose a maximum railroad rate bill by initiative petition. The railroad's referendum petition was not filed.

*General Election, 1904.* A primary nominating election law was proposed by initiative petition and enacted by the people. This law killed the political party bosses and destroyed their machines, both State and municipal, from constable to United States senator. Under its provisions the people selected two United States senators at the

June election in 1906, and their choice was almost unanimously ratified by the legislature in twenty minutes; the usual time under the old plan was forty days. There was no hint or charge of bribery, corruption or undue influence in any form.

In June, 1904, a local option liquor law was proposed by initiative petition and enacted by the people. Under this law eight counties and many precincts in other counties have voted "dry." The liquor dealers made a savage and costly campaign against this bill; they tried to amend it out of existence in the legislature of 1905, and again by initiative petition before the people in 1906, but the last defeat was by three times the first majority. Most of the university and college counties and towns are "dry."

The legislature of 1905 was controlled in many things by a combination of the representatives and senators from the six counties in which are located the State university, agricultural college and four normal schools.

Three of the latter were created as a part of legislative bargains and log-rolling for United States senators or other equally useless purposes. There was and is much dissatisfaction with them on that account. They put their appropriations in the general appropriation bill for the maintenance of the State government, contrary to the constitution but in accordance with the custom of many years, so that the governor would not veto it. The log-rollers attempted to put their appropriations beyond the people by attaching an emergency clause, but the governor told them he would veto the bill if they passed it in that form; for that reason only they abandoned the emergency clause, leaving the whole bill subject to referendum petition. A referendum petition was filed but thereafter neglected. No further contest was made against the appropriation bill and it was approved at the general election in 1906. But it stopped the practice of log-rolling many appropriations into one bill. The legislature of 1907 obeyed the constitution in that respect.

*General Election, 1906.* The people approved four amendments to the constitution proposed by initiative petitions; extending the reservation of the initiative and referendum powers to all local, special and municipal legislation; referendum against items, parts and sections of any bill; granting home rule to cities and towns in all their municipal affairs, free from interference by the legislature and limited only by the constitution and criminal laws of the State; allowing one legislature to propose amendments to the constitution (the former

provision required the proposal by two consecutive legislatures) and requiring the governor to decide and proclaim whether an amendment is adopted, following the Maine and Maryland constitutions in that respect; granting greater legislative power over the State printing and compensation therefor; enacted two corporation tax laws and an anti-pass law, but the latter was void because the enacting clause was forgotten.

*Proposed by Initiative Petition and Rejected.* A constitutional amendment for woman suffrage; a bill to sell the State a toll road for \$24,000 on which the promoters were making a profit of \$16,000; a bill proposed by the liquor dealers to amend the local option law.

These measures were prepared by six different organizations; the State Grange had two, The People's Power League five, and the others one each.

In 1904, Portland granted a franchise to a new telephone company on municipal initiative petition. The city council had refused to grant it, though better terms were offered the city than ever before.

In 1907, the people of Portland, at their municipal election, voted on nineteen charter amendments and ordinances under their initiative and referendum powers. Most of the measures were proposed by the council. A number of proposals for franchise grants have been abandoned since 1905 because of threats of the referendum. Many cities have amended or rejected proposed amendments to their charters, some offered by initiative petition and some by the city councils.

The legislature of 1907, under its new power, submitted four amendments to the constitution; one to change the general election from June to the date of November congressional elections; one authorizing legislation for the improvement of the judicial system; one to increase the pay of legislators from \$120 to \$400 for a regular session and one to allow the people to establish State institutions at other places than the State capitol.

Four referendum petitions have been filed against acts of the legislature; one against a bill appropriating \$100,000 to build armories; one against a bill denying the right of eminent domain to railroads which do not agree to carry State officers free of charge; one against a bill which would result in increasing the profits of the sheriff's office in counties of 50,000 population and over; one against a standing appropriation of \$125,000 for the State university. As to the latter, it is a positive expression of what used to be the very general

feeling that those wanting the higher education should pay for it, and that the State does its full duty when it teaches the "three Rs." The appropriation is not the result of anything like previous log-rolling combinations, and is very moderate if the State is to maintain a university at all. It is to be hoped that this appropriation will be approved by a great majority of the voters, and a vigorous educational campaign is to be made for it.

Initiative petitions are in preparation for constitutional amendments as follows: woman suffrage; exempting from taxation factories, machinery, and residence buildings, but not land or lots on which they are situated; authorizing enactment of laws for proportional representation and majority elections; for the recall against public officers.

Initiative petitions for statute laws: a bill for a salmon fisheries law; a bill instructing the legislature to elect for United States senators those candidates selected by the people at their general elections; a corrupt practices law modeled on the British acts of 1883 and 1895, but also providing for the circulation of campaign literature partly at the public expense.

It is probable that there will be fifteen important measures on the ballot for the voter's approval or rejection next June.

#### SUMMARY

The people have abolished party bosses and political machines; made the liquor question and prohibition a purely local issue; increased the legislature's respect for the constitution; greatly injured, but not yet destroyed, the legislative log-rolling industry; taken municipal affairs out of the legislature; taxed some corporations that were dodging; in the matter of amendments to the constitution, greatly increased the power and responsibility of the legislature and governor; under the efficient leadership of prominent teachers of the State, the high schools are debating the nominating elections law, proportional representation, people's direct election of United States senators and other live problems in representative government; for the first time in American history the school teacher is taking his rightful place as an educator in the science of government, instead of being a victim in the game of politics; the high schools of Washington are debating whether their State should adopt the initiative and referendum provisions of the Oregon constitution; the voters of the State and cities are taking an interest in their government far greater than

ever before, and growing rapidly to the full measure of their power and responsibility.

The people of Oregon have learned that to get the best results they must do their own governing every day. They know that government is human, not mechanical; that the election of good men for officers is not like winding a clock, which may be safely left to do its work, needing only to be wound again at set times. The voters of Oregon realize that government is rightly named the Ship of State; that governing is like sailing a ship in this, that to steer a straight course they must hold the helm and control their officers all the time.

There is fear of the initiative now among some of the men who helped to establish the system in Oregon, because the people could abuse the power. Officers have been known to abuse power, they say, what may the people not do? But fear is the only sign of such a danger. Capitalized vice, political grafting, legislative log-rolling and corporate tax dodging, thus far, are the only industries in Oregon to confess injury from the people's use of the initiative and referendum powers.

It is probable that some day our initiative plan will be improved by allowing the legislature opportunity to offer a competing measure, both to be submitted to the people at the same election. Hon. Geo. H. Shibley of Washington, D. C., made this suggestion last year. But as to repealing either the initiative or the referendum powers, there is only one opinion in Oregon.

## THE INITIATIVE AND REFERENDUM IN OREGON

BY MR. GEORGE A. THACHER

*Portland, Oregon*

In responding to the invitation of the program committee of the American Political Science Association, to furnish a statement of my investigations and conclusions concerning the political institutions of Oregon, I propose to discuss the subject under three heads. Under the first I shall give the substance of the initiative and referendum amendment to the State constitution, and enumerate the laws enacted under its provisions. Under the second head I shall comment briefly on the way in which these political innovations came about, the attitude of the courts towards them, and the question of their advantages and disadvantages as shown by experience. Finally, I shall attempt to make some suggestions in the line of a forecast.

### I

In June of 1902, by a vote of 62,024 for, to 5668 against, the people of Oregon amended sec. 1, art. iv of the constitution. The significant words are as follows:

The legislative authority of the State shall be vested in a legislative assembly, consisting of a senate and house of representatives, but the people reserve to themselves power to propose laws and amendments to the constitution, and to enact or reject the same at the polls, independent of the legislative assembly, and also reserve power at their own option to approve or reject at the polls any act of the legislative assembly.

The position of the State's chief executive is defined thus:

The veto power of the governor shall not extend to measures referred to the people.

In regard to the adoption of laws by the people:

Any measure referred to the people shall take effect and become the law when it is approved by a majority of the votes cast thereon, and not otherwise.

In the matter of proposing measures under the initiative, 8 per cent of the voters can secure the reference to the people of any law or amendment by filing a petition, with their signatures attached, with the secretary of state not less than four months before election day, such petition containing the measure in full.

The referendum can be secured upon any act of the legislature at the next general election by filing a petition (within ninety days after the final adjournment of the legislature) with the secretary of state. Such petition shall be signed by 5 per cent of the voters.

The legislature may refer any measure adopted at any session to the people at the next general election, or it may provide a special election for the purpose. The veto power of the governor is suspended in that instance. It is an old provision of the constitution (sec. 28, art. iv) that no act of the legislature shall take effect until ninety days after the final adjournment of the legislature, so the referendum amendment fits in with that provision. There was an exception made in the case of laws necessary for the immediate preservation of the public peace, health or safety. The referendum amendment also recognizes that occasional necessity for speedy legislation and provides that if the emergency clause, so-called, be attached by the legislature to any act, the referendum is barred.

At the June election, in 1904, two laws were adopted at the polls under the initiative. The first was a local option law providing in detail for regulating the liquor traffic. It was adopted by a vote of 43,316 for, to 40,198 against. The nominating elections law, generally known as the primary law, was adopted at this election by a vote of 56,285 for, to 16,354 against. The act is a lengthy one and I can only indicate its provisions. Its object was to overthrow the caucus and convention system of nominations and to make all nominees truly representative. In order to secure that result it was the declared purpose of the law to extend the provisions of laws governing general elections to primary elections. The primary election thus becomes a general election within each party to secure the election of nominees. The law recognizes as a political party any organization which polled 25 per cent of the vote of the State at the preceding election. Every such party shall nominate its candidates under this law and in no other way. Every political party shall have the right to be protected from interference, and to secure that result every voter who registers shall be asked what party he belongs to and his answer shall be entered with his registry, if he is to be permitted to vote at the primary elec-

tion. At that election he shall be given the ballot of his party and no other. In order to distinguish party ballots with ease the republican ballots shall be printed with black ink on white paper; the democratic ballots on blue paper and any third party ballots on yellow paper. Duplicate ballots shall be printed on cheap paper of other colors and distributed before election day as samples for information. The primary election shall be held on the forty-fifth day preceding the regular election.

In regard to the candidates at the primary election, each one shall have his name printed on the official ballot of his party who shall have filed a petition for that purpose with the signatures of 2 per cent of the party vote attached. The signers shall be legal voters residing in such different precincts of the district electing the official as shall insure more than a purely local endorsement. A certain percentage of the whole number of precincts is required. Not more than one thousand signers shall be required for any candidate for State office.

The candidate must promise not to withdraw and that he will qualify if he is elected. He may advocate any measure or principle on his petition within the limit of one hundred words, and he shall be allowed a printed statement on the official ballot of twelve words concerning such measure or principle.

In the case of a candidate for the legislature, he may include in his petition one of the following statements, but if he does not his petition shall not be refused on that account.

#### STATEMENT NO. 1

I further state to the people of Oregon as well as to the people of my legislative district, that during my term of office, I will always vote for that candidate for United States senator in congress who has received the highest number of the people's votes for that position at the general election next preceding the election of a senator in congress, without regard to my individual preference.

#### STATEMENT NO. 2

During my term of office I shall consider the vote for United States senator in congress as nothing more than a recommendation, which I shall be at liberty to wholly disregard if the reason for doing so seems to me to be sufficient.

The law prescribes that candidates for United States senator and all elective officers shall go before the people at the nominating election.

At the June election, of 1906, the following measures were passed upon at the polls, the total number of ballots cast being 99,445. The referendum on appropriation bill adopted by the legislature of 1905 was the first. The measure was approved by a vote of 43,918 for, to 26,758 against. An equal suffrage amendment was defeated by a vote of 47,075 against, to 36,902 for. An amendment to the local option law was defeated by a vote of 45,144 against, to 35,297 for. A law appropriating \$24,000 to buy a private toll road was defeated by a vote of 44,527 against, to 31,525 for. An amendment providing a method for amending the constitution was carried by a vote of 47,661 for, to 18,751 against. An amendment giving cities and towns exclusive powers to enact and amend their charters was adopted by a vote of 52,567 for, to 19,852 against. An amendment placing the State printer's office under control of the law instead of the constitution was adopted by a vote of 63,749 for, to 9,571 against. An amendment permitting the use of the initiative and referendum on local, special and municipal laws and parts of laws was adopted by a vote of 47,678 for, to 16,735 against. An act laying gross earnings tax upon sleeping car companies, refrigerator car companies and oil companies was adopted by a vote of 69,635 for, to 6441 against. An act prohibiting free passes and discriminations by public service corporations was adopted by a vote of 57,281 for, to 16,779 against. An act laying gross earnings taxes on express, telegraph and telephone companies was adopted by a vote of 70,872 for, to 6360 against.

## II

The campaign in Oregon for more democratic institutions began about ten years before the adoption of the initiative and referendum. The organizations behind the movement were the Oregon Grange, the Knights of Labor and the Portland Federated Trades. Mr. W. S. U'Ren, a lawyer of Oregon City, became the executive leader by virtue of ability and willingness to serve. The movement secured the aid of many of Oregon's leaders by its promise to eliminate the political boss and his kingdom. Some of those leaders are more conservative today than they were ten years ago, but the supporters of all new movements are subject to that ebb of enthusiasm after victory. The political boss in Oregon adopted as high-handed methods as ever were in vogue in Pennsylvania. The fights centered, as elsewhere, on the election of United States senators. In Prof. George

H. Haynes' valuable book, *The Election of Senators*, as well as in Oregon's historical documents, will be found an account of legislative sessions practically monopolized by senatorial contests. In fact one legislature never even organized because of the bitterness of the fight, and the State departments were run on credit. The assumption that party rule is the rule of the majority was again disproved, though, of course, loyal party men laid the blame on party factions. The idea that party rule is necessary in a democracy, instead of being merely a convenient method, dies hard and causes many recriminations. But the conditions in Oregon made people forget party rule. The following editorial expression of the leading Oregon newspaper during the struggle to kill the tyranny of boss and machine is illuminating:

The referendum is an obstacle to too much legislation; to surreptitious legislation; to legislation in particular interests; to partisan machine legislation, and to boss rule. No predatory measure could be carried before the people. The legislative lobbyist would be put out of business.

Such were the conditions that gave birth to the referendum. It was adopted in the manner prescribed by the constitution. The measure received a big majority in the legislature in 1899 and the legislature of 1901 passed it almost unanimously, while the people gave it a vote, in 1902, mentioned at the beginning of this paper, 11 to 1.

The legislature of 1903 passed a law under its provisions which was the indirect means of bringing the amendment before the supreme court of the State. The act in question gave a new charter to the city of Portland and the emergency clause was added in order to permit the city to construct at once certain bridges over the Willamette river as a matter of public safety. When the emergency clause is attached the law goes into effect at once and the referendum is barred.

A question of reassessment for bridge improvements brought the validity of the amendment into court. The court held that the amendment had been legally adopted. It also held that the attaching of the emergency clause to the act was a purely legislative question and not a judicial one. The court decided that the initiative and referendum amendment did not conflict with the Constitution of the United States which guarantees to each State a republican form of government. The definition was given as follows:

A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority.

In regard to the Oregon amendment it added:

The people have simply reserved to themselves a larger share of legislative power, but they have not overthrown the republican form of the government, or substituted another in its stead.

In commenting on the initiative feature of the amendment the court said in substance that laws proposed and enacted by the people may be amended or repealed by the legislature at will.

One provision in the amendment, "The veto power of the governor shall not extend to measures referred to the people," received considerable attention in the decision, and as it has been hopelessly misconstrued, its importance justifies an explanation. Mr. Frank Foxcroft in a critical argument printed in the *Atlantic Monthly* for June, 1906, took the ground that the court's decision declared in effect that all legislation by the voters at the polls was subject to the governor's veto. That is a complete mistake though the blunder was a natural one. The words of the decision are:

The veto power of the governor is not abridged in any way, except as to such laws as the legislature may refer to the people. \* \* \* The provision of amendment must necessarily be confined to the measures which the legislature may refer, and cannot apply to acts upon which the referendum may be invoked by petition.

Also,

Unless, therefore, he has a right to veto any act submitted to him, except such as the legislature may especially refer to the people, one of the safeguards against hasty or ill-advised legislation, which is everywhere regarded as essential, is removed, a result manifestly not contemplated by the amendment.

The point that Mr. Foxcroft overlooked was this: The amendment provides that certain acts of the legislature shall not be subject to the governor's veto, a decided innovation in American politics. The court was rigidly limiting that exception to the particular acts of the legislature specified by the amendment and explaining how all other acts of the legislature must continue to be subject to the governor's veto. No question of legislation by the people at the polls was at issue; it was entirely a question of the legislature and the governor, where the governor's veto might be suspended by the legislature

through an appeal to the people. Further illumination can be had by a careful reading of *Kadderly v. Portland* in vol. 44, Oregon Reports, 1903-1904. The language of the amendment shows clearly that the verdict of the people is final so far as the legislative act is concerned.

I have recently asked Governor George E. Chamberlain, who was chief executive at the time of the passage of the act establishing the Portland charter under which suit was brought and who as one of the leading lawyers of the State appeared before the supreme court as counsel for the city of Portland, for an expression of opinion. I referred him to Mr. Foxcroft's argument. His response is as follows:

I am sure that the court in the case referred to did not intend any such construction upon the law, nor has the executive ever understood that he had the right to exercise the veto power on acts passed by the people at the polls. On the contrary, he declined in at least one case to veto an act initiated and passed at the general election, held in 1904, on the ground that he did not have the power or authority, under the constitutional amendment referred to, to veto such act. The veto power of the governor remains intact, however, as to acts passed by the legislature, except that the power is denied as to such laws as the legislature may refer to the people.

I have alluded to the fact that the court decided that the attaching of the emergency clause to an act of the legislature was a purely legislative question and not a judicial one. That places in the hands of the legislature the power to bar any referendum petition by the people by declaring that an emergency exists and that for the public health, peace, and safety, the law must go into effect at once. The legislature of 1905 attempted to use the emergency clause indiscriminately for the unquestioned purpose of barring referendum petitions. The governor vetoed some acts and informed the members of the legislature that he should veto every act that had the emergency clause attached unless the peace, health or safety of the State was really threatened. Of course, under the supreme court decision a legislature which would pass a measure over the governor's veto, could bar any referendum petition by the people by attaching the emergency clause. Thus it will be seen that a weak-kneed governor and an unscrupulous legislature with a big working majority might render the referendum useless.

The legislature of 1905 succumbed to the governor's threat, but attempted to bar the referendum on appropriations for State normal schools (which were bitterly opposed), and which were secured in

the legislature by "log-rolling" tactics, by including in one bill appropriations for the normal schools, the State insane asylum, penitentiary, deaf-mute school, blind school, the State university and the agricultural college. The assumption was that as the next election was over a year off the people would not be willing to put up with the inconvenience of having the State institutions without funds until after the June election of 1906. The holding up of a law for such a long period does counsel prudence on the part of the people, but in this case a referendum petition was actually filed. The surprising thing was that at the election of 1906 that act of the legislature was approved at the polls by a vote of 43,918 for, to 26,758 against. A possible explanation is that the people realized that if they defeated the act the State institutions would have to be run on credit for another year unless the governor called the legislature in special session. It may be said incidentally that the people don't approve of special sessions. The net result was that the legislature won its point in defiance of public opinion, but no such tactics were tried in the session of 1907, and probably will not be tried until some very unusual combination of circumstances arises. The rule of the minority cannot be carried beyond a certain point when public opinion is aroused.

A law was passed by the legislature in 1903 (H. B. 59) prescribing methods for putting the initiative and referendum into effect. That was repealed in 1907 and a new act (H. B. 123) remedying certain defects was enacted. As an indication of the difficulties in drawing such a law it is worth while to refer to the ballot title of initiative laws as regulated by the law of 1903. That law directed that title to bill, which should appear on official ballot, should be furnished by the association filing the petition and should be limited to twenty words. In the June election of 1906 the liquor interests proposed an amendment to a local option law adopted in 1904, and gave it a ballot title which was claimed to be misleading. The question was taken into the supreme court, as the law permitted, and the court decided under the act in question that the title should stand. The law of 1907 requires the secretary of state to transmit copy of measure to the attorney general who shall within ten days return a ballot title of not exceeding a hundred words, to be a true statement and not an argument or likely to create prejudice for or against the measure. The attorney general's ballot title may be questioned in the circuit court, whose decision is final.

The secretary of state exercises certain judicial powers in referring

measures to the voters, which may be filed with him, but his construction of the initiative amendment to the constitution may be questioned in the circuit court with the right of appeal to the supreme court. An instance of the kind occurred this year in regard to the referendum on a certain law passed by the legislature at the 1907 session. The secretary of state refused to file a referendum petition because the title given by the legislature to the act was not correctly quoted in the petition, and because the petition, which had been circulated for signatures, did not contain the warning that it was a felony to sign illegally. The latter provision was made a part of the law of 1907 in regard to initiative and referendum petitions on account of the recklessness of men engaged in securing the necessary number of signers. The circuit court sustained the secretary of state, but on appeal the supreme court reversed that decision on the ground that the warning clause was directory and not mandatory, and that as the text of the law was given an exact repetition of the title was not necessary, thus discriminating between an initiative petition and a referendum petition on the ground that the title in the latter case was merely for identification.

The secretary of state is required by law to furnish county clerks copies of names of candidates and the ballot titles of bills with numbers in the order of filing. The county clerks are required to print on ballots titles and numbers as furnished and to designate measures under the different heads:

"Referred to the People by Legislative Assembly."

"Referendum Ordered by Petition of People."

"Proposed by Initiative Petition."

Three months before election the secretary of state shall print in pamphlet form a copy of title and text of measure with ballot number, and shall print and bind with such pamphlet any arguments for or against such measure which have been furnished him. Only the organization filing petition may furnish affirmative arguments, but any person may furnish opposing arguments. The persons offering arguments shall pay the cost of printing for one copy for each voter in the State.

Not later than the fifty-fifth day before election the secretary shall mail, postage prepaid, a pamphlet to every voter whose address he may have. Prof. George H. Haynes, in the last number of the *Political Science Quarterly*, has suggested that under the Oregon law for circulating arguments, pro and con, with measures to be voted

upon at the polls, that there is absolutely no restriction as to kind or quantity of matter printed, so long as the State printer's bill is paid. He declares, and truthfully, that a prohibitionist organization might have printed and circulated with a proposed prohibition law the sentimental effusion beginning, "Father, dear father, come home with me now," or any similarly cogent argument. That would doubtless add something to the gaiety of the campaign, but in view of the American sense of humor that sort of thing would hardly prove to be a vote-getter. Seriously, however, the Oregon law would permit a political organization to have printed by the State printer such a publication as *Coins' Financial School* and would put it into the hands of every voter in the State if it bore on any proposed law. At the same time and in the same pamphlet it would permit whatever opposing arguments might be offered, to be circulated to the great good, or the great befuddlement, as the case might be, of the individual voter. If there is any virtue in what is called a campaign of education, the Oregon law permits it to be carried to the extreme limit.

In Mr. Foxcroft's criticism in the *Atlantic Monthly*, he makes the point that two contradictory measures may be adopted at the polls thus "rendering confusion worse confounded." The law of 1907 provides that where two conflicting measures receive an affirmative majority, that one shall be in effect which has the larger number of affirmative votes, regardless of the size of the majority. That is simple and conclusive.

The final important provision of the law in regard to State elections is that within thirty days after election the secretary of state shall canvas in the presence of the governor the votes for each measure, and the governor shall issue a proclamation stating votes cast for and against, and declaring those approved by a majority to be the law of the State from the date of the proclamation.

The provisions of the primary election law, given in the first part of this paper, have been accepted without any particular friction. There was some objection on the part of individuals at the time of registration, before the election of 1906 to stating to what political party they belonged, but it was not serious enough to disturb the working of the law. It seems a little inquisitorial, but there is probably no other method of securing representative party nominations at the polls. The first trial of the Minnesota primary law (adopted some seven years ago) in the municipal election in Minneapolis permitted certain abuses. A candidate for mayor secured his nomina-

tion on the republican ticket with the aid of voters who were not republicans. His election in that republican city followed, and ultimately certain criminal prosecutions followed with the result of the creation of a Minneapolis colony at the State penitentiary at Stillwater.

The provision of the Oregon primary law permitting candidates to recommend certain measures or principles within the space of twelve words on the primary ballot, was more honored in the breach than in the observance. In 1906, of ninety-three candidates filing petitions, but thirty-one availed themselves of the privilege.

The chief interest in the law centers in the election of United States senators. As candidates for the senate file their petitions and submit to the same requirements as candidates for the office of sheriff the crucial question in the campaign resolves itself into the election of members of the legislature who have (or have not) signed statement No. 1. In the June election of 1906 there were seventy-five members of the legislature elected. Of that number *forty-eight* signed statement No. 1. Eight more signed that statement in a modified form and promised to vote for their parties' choice. Of course all strong partisans are inclined to construe statement No. 1 literally when their candidate wins, and to object to it as absurd if the other candidate gets the majority of the popular vote. At the election of the legislature of 1907 the candidates receiving majority votes at the June election were members of the dominant party in the legislature. As a matter of fact, however, members of the legislature, regardless of party, voted for the people's choice, even where they had not signed statement No. 1. The candidate for the short term received the vote of every member of the legislature who was present. The candidate for the long term received all but seven votes and they belonged to his own party. It is true that partisan leaders of the old school don't approve, but if the precedent set by the legislature of 1907 is followed, the election of United States senators will be reserved to the people, and the legislature will act in the capacity of the electoral college. Of course the national electoral college was designed as a check on democracy, but public opinion made it merely the instrument for recording a democratic choice.

In the Oregon experiment, if public opinion persistently and unqualifiedly demands that the legislature ratify the people's choice for United States senator, there need be no fear that it will refuse to do so. On the other hand, if partisan leaders can induce a party majority

in the legislature to repudiate the decision of the voters at the polls, the vote of the people will become merely a recommendation. It has been the rumor that a measure will be submitted to the voters at the polls next June to compel candidates for the legislature to sign statement No. 1. That seems wholly to underrate the power of public opinion, besides practically setting at defiance the Constitution of the United States. It shows the attitude in Oregon of the old party leaders who are disposed to criticise the primary law because it may disrupt parties and because they think that comparatively unknown candidates may secure office under its workings, as contrasted with the defenders of the law who are even disposed to enact another law to compel public opinion to do its work.

The primary law has not actually become a bone of contention, but it has been criticised so constantly that there are many intelligent people who feel that there is something wrong with it. There seem to be two causes for irritation, but I am inclined to believe that the root of the trouble is not recognized.

In Lecky's *Democracy and Liberty* the statement is made that in a democracy parties are apt to run along parallel lines striving for the same object. Where there are hereditary rulers parties are certain to be opposed on principles. To be sure there have been many labored arguments to prove that a democracy must be a government of parties, but it is evident that United States history shows that the word "party" has come to mean the party machine in a majority of instances; and that is the rule of the minority. Undoubtedly a terrible issue like slavery can create a party, and lesser issues can create new lines of demarcation, but they don't last. In municipalities it is especially true that the party machine is the real ruler. There is no democracy about it; it is the rule of the minority—hence all our municipal woes. Under our systems of checks and balances and party machines with their bosses, we do not have nearly as much of a democratic government as we think we do, and the miseries we suffer from cannot be attributed to democracy at all. Democracy may be as bad a thing with as desperate a fate as Burke pointed out in his arraignment of the French Revolution, or as Macaulay predicted for the American democracy in the twentieth century, but it seems to be wasting energy as well as criticism to treat autocratic party rule as real democracy or as a close approach to democracy. To be sure it is asserted in the preamble of the Oregon primary law that it is intended to assure to the people that political parties, which are

regarded as necessary, shall be fairly, freely and honestly conducted, but I believe that the real effect of the law is to make parties rather temporary affairs with loose organizations, and to make proposed measures and the personalities of candidates the live issues. The protests and criticisms of old party leaders seem to confirm that view; while the enthusiastic defenders of the law cling to the name of party rule while working for independence of party dictation. Things are in a transition stage in Oregon.

The other cause for irritation affects the plain people. It is, briefly, the fact that a wealthy man can advertise himself and conduct a more aggressive campaign than a poor man can possibly do. I have heard more than one intelligent man say that he was opposed to the primary law if it was going to give rich men such an advantage over poor men. A so-called corrupt practices act was introduced in the legislature in 1907, but it was so burdened with restrictions as to what a candidate, might not do that it defeated itself. If it were not for the very real and generally diffused feeling of dissatisfaction behind it, the whole thing would be frankly amusing. Nobody objected to a candidate having money when he was nominated by the caucus and convention system. It was considered a good thing that he should help the party fight his battle, though there was always a risk of money being used dishonorably, especially in the case of election of senators by the legislature. Of course the dishonorable use of wealth and power was not approved, but many things were winked at. Now, in the revolt against that old method there is disgust at the thought that a man may spend \$30,000 in postage stamps and printing to get his name and merits before the individual voters through as harmless a channel as the postoffice. No one contends, of course, that a voter is going to be seduced by a few postage stamps that have been cancelled, but the objection remains. Very probably it is due to the growing feeling against the undue use of money in elections, and is not altogether discriminating. I believe that New York has a law requiring candidates to furnish an account of money spent in an election, leaving public opinion to work its will in view of all the circumstances.

It is hard to see how there can be any better method, and it is harder to see how any restrictive law can be made entirely effective. In Oregon, for instance, which Mr. Harriman says is the playground of America, what can prevent a wealthy man who wants to go to the United States senate from spending his time and money for many

months before election in traveling over the State, ostensibly for pleasure, and incidentally making the acquaintance of the voters and discussing measures which are intended to be of benefit to the people? It is electioneering of a subtle sort, but how can it be brought within the meaning of any corrupt practices law? Is not public opinion the only trustworthy guide in each case? Of course, that may be mistaken, but it is difficult to see how any law can settle the question wisely.

In the matter of legislation by the voters at the polls, at the June election of 1906 there were two measures adopted which are of immediate and great importance. One was a law laying gross earnings taxes on certain public service corporations, and the other was an amendment to the constitution giving municipalities complete independence or home rule. It has been pointed out by opponents of legislation at the polls that when it comes to prescribing rules for taxation the average voter has no qualification but complete ignorance of the subject. It is probably fair to say that the average voter never heard of laws of the shifting and incidence of taxation. For these reasons the circumstances attending the laying of taxes by the voters of Oregon have a peculiar interest, especially as one corporation has refused to pay the levy and the matter is now in court with a possibility of its being carried to the supreme court of the United States. By a vote of about eleven to one laws were passed in 1906 laying a gross earnings tax of 3 per cent on sleeping car companies, refrigerator car companies, oil companies and express companies, while a gross earnings tax of 2 per cent was laid on telephone companies and telegraph companies. These gross earnings taxes were laid in addition to taxes now provided for by law. The companies were required to file with the State treasurer, on or before the first of March of each year, a sworn statement of gross receipts, and if they failed to pay such tax it became the duty of the legal department of the State to collect it with the addition of a penalty of 10 per cent. The taxes are claimed to be excessive, but it is clear that at the time of the laying of the taxes that depended upon the valuations upon which these corporations were taxed by general laws. The Pacific States Telephone and Telegraph Company filed its statement of gross receipts in 1907 as required by law, but it has not paid the tax. The State has brought suit in the circuit court of Multnomah county to collect the tax and an argument will soon be heard on a demurrer filed by the counsel for the corporation.

I had a talk recently with the local counsel of the telephone company and at my request he gave me a list of the taxes which his company pays. It may be remarked incidentally that Oregon has not made as great progress in tax reform as some other States in the Union. The company pays what is known as the general property tax on all its real and personal property. It pays an annual State license tax of \$200 a year. It pays a city of Portland annual license tax of \$1000 a year. It pays a city of Portland occupation tax of \$75 per quarter or \$300 a year. In the year of 1906 the assessor in response to public sentiment on the subject of taxation in general, included in his valuation of the company's property an estimate of the company's franchise of a quarter of a million dollars. Against that amount the general property tax is levied the same as if it were real estate. The 2 per cent gross earnings tax completes the list. It must be admitted that the general scheme as outlined above violates the canons of just taxation. However, before condemning the action of the voters it will be necessary to know their reasons for action. The legislature of 1903 created a new system of taxation for the State which was duly adopted. Six months later it was discovered that through inadvertence the law was so framed that it would not go into effect until a year later than it was generally supposed to do. The old tax law having been repealed, the State faced the prospect of no revenue for a year. In that crisis the governor called the legislature in special session to remedy the defect. The legislature, adopting the wisdom ascribed to the man in nursery rhyme, "who jumped into a bramble bush and scratched out both his eyes," promptly repealed the law it had enacted with such pains, and as promptly enacted the law it had previously repealed. The tax law then having its eyes scratched in again, the legislature adjourned. The jump in and the jump out did leave one permanent effect, for whereas formerly a few hundred dollars worth of property was exempted from taxation in the case of each individual, now there is no such exemption. It will doubtless be a long day before that supposed injury is forgotten by poor men. The legislature of 1905 created a tax commission to report at the 1907 session a plan for remodeling the tax laws, but the people were impatient and laid some taxes themselves at the polls in 1906. The legislature justified the people's opinion of it in 1907 by dumping the really valuable report of an able commission into the waste paper basket. It is now proposed to put some of the recommendations of the tax com-

mission into effect by bringing the measures before the voters at the polls by initiative petition.

It is also interesting to note that the report of the tax commission shows beyond any doubt that the public service corporations of Oregon have succeeded for years in escaping paying from one-half to two-thirds of their share of taxes, principally by the means of exceedingly low valuations of real and personal property, and no mention at all of franchises. As the move to tax franchises is a result of the popular wave, it is clear that it won't do to condemn too sharply the legislation at the polls laying gross earnings taxes. The legislature of 1907, in common with many other legislatures in many other States, showed a certain compliance with the wishes of large corporations both in the matter of taxes and in confirming perpetual franchises. If a State were to be offered the choice between radical legislation at the polls and a legislature too compliant to the wishes of corporations and vested interests, it might well hesitate. In Oregon, however, the two working together promise to be corrective. Each may amend or repeal the act of the other, while the last word rests with the people who elect the members of the legislature. An instance in point has been furnished in the past year-and-a-half. As mentioned in the first part of this paper, the voters enacted an anti-pass law at the polls in 1906. Its provisions barred every State and municipal officer from accepting free service from quasi public corporations. It was very strict and provided for removal from office on conviction of violation of its provisions. The legislature of 1907 passed a law (which repealed all laws or parts of laws conflicting with it) requiring railroads to furnish free transportation to all State, district and county officers. The next move was a referendum petition filed with the secretary of state by 5 per cent of the voters asking that this act of the legislature be referred to the voters at the next regular election, which will be in June of 1908. There is probably little doubt as to the fate of the free pass system in Oregon. On the other hand the amendment by the legislature of a defective law passed at the polls would doubtless be accepted in good part and be allowed to stand.

The referendum was invoked on three other measures enacted by the legislature of 1907. Two were on the score of economy, one being an increased appropriation for the State university, and the other a \$100,000 appropriation for armories for the State militia. There is very strong disapproval of the referendum on the university appropriation which has called forth bitter criticism of the initiative and

referendum amendment, especially on the part of old party leaders who have seen their power departing. The other measure on which the referendum has been invoked involves a political squabble over the sheriff's control of prisoners (including the cost of their meals) in the county in which Portland is situated. It was in reality special legislation, but it passes as general by being applied to all counties having over 100,000 population. A State referendum on the squabble tends to throw contempt on the proceeding, which naturally is taken advantage of by the disgruntled and pessimistic. It is doubtless a good thing to see what faults can be charged to the amendment or to political plays which may bring the amendment into action. With free discussion or even recrimination the public will be apt to discriminate more or less clearly, and the novelty of a new power having worn off it will probably not be used without some strong motive.

In view of the historical fact that cities and towns as pointed out by Adam Smith, 130 years ago, have been the fulcrum by which democratic rights have been secured, perhaps the most significant legislation at the polls in Oregon was the amendment to the constitution of which the following are the significant words:

The legislative assembly shall not enact, amend or repeal any charter or act of incorporation for any municipality, city or town.

The power is given unreservedly to the voters subject to the constitution and criminal laws. It is undoubtedly the first time in the history of the United States that any city or municipality has been made entirely independent. As to the actual reality of that independence there is a confirmation in the recent decision of the Oregon supreme court on the Port of Columbia law. The amendment giving municipalities power to enact their own charters was adopted at the polls in 1906. The legislature of 1907 passed a law creating the Port of Columbia composed of the three counties between the mouth of the Columbia and the city of Portland for the purpose of regulating towage and pilot service from the ocean to Portland. The matter was carried to the supreme court by opponents of the law and the court decided that the Port of Columbia was a municipality within the meaning of the amendment to the constitution, and that, consequently, the legislature had no power to create the Port of Columbia municipality.

Whatever valid objections there may be to legislation by the voters

at the polls, the experience of Oregon, so far as it has gone, goes to show that in directness and efficiency the action of the people compares remarkably well with the work of the legislature. It is not unreasonable to assume that any organization that wishes to get a measure referred to the people under the initiative will take rather more pains to have it well drawn and as clear and simple as possible, than a member of the legislature would do in proposing a bill to that body, to say nothing of the chances of having his bill mutilated in the committees of two houses and emasculated by amendments on the floor. I am aware that the latter form of procedure is supposed to make for prudence and care, but I doubt if any careful student of legislation by congress or State bodies will seriously maintain that practice confirms the theory.

The city of Portland held an election in June of 1907 under the new conditions created by the amendment. No one can claim that it created particular interest or was a remarkable success. There was a small registration of about 25,000 and of that number about 17,000 went to the polls. The interest centered in the election of mayor, though the council is even more important to the welfare of the city than the mayor. The mayor, however, is supposed to be the responsible head, and as he had made a good record by vetoing free gifts of franchises to public service corporations and had attempted to check the sale of dissipation in a city where saloons are as plentiful, proportionally, as they are in Chicago, he had come to represent a policy. He is a democrat and Portland is a republican city by two to one, but he was elected by some 700 majority.

The legislature of 1907 passed a law to make effective the amendment giving cities home rule. In view of the Port of Columbia decision it may be questioned if the legislature had any power in the matter. That law, however, provided that amendments to the city charter might be referred to the voters without any initiative petition. The consequence was that of *twenty-one* measures submitted to the voters only one was offered by a petition from the voters. Five different amendments to the city charter appropriating some five and one quarter millions of dollars were passed by the council and referred to the voters. It was practically new legislation by the council with a referendum to the voters. The proceedings were in violation of the charter and rest only on the legislative act. The matter is now in the courts on the question of the legality of the acts. However, that does not affect the action of the voters except as showing lack of enough

interest to organize to have petitions for laws and amendments drawn and to get enough signers to have them referred to the voters. Of the 17,000 voters who went to the polls about 14,000 took enough interest to vote on questions submitted by the council. All amendments appropriating money were passed. The three millions of water bonds were voted by 7247, to 7116 against; the million of park and boulevard bonds by 8143 for, to 6143 against; the half a million dock bonds by 9414 for, to 4547 against; \$450,000 bridge bonds by 11,872 for, to 2568 against; \$275,000 fireboat and water main bonds by 8955 for, to 4988 against. All measures to raise the salaries of city officials were defeated by big majorities. A long and intricate electric wiring ordinance was defeated. A city free employment bureau was created by a vote of 10,016 for, to 3433 against. An ordinance increasing saloon licenses to \$800 per annum and providing that no new ones should be issued until the population showed an excess of 500 persons to each saloon, was adopted by 7969 for, to 6234 against. The council, which is not unfriendly to the liquor interests, thus secured the approval of the voters for an ordinance which in effect gives an actual monopoly of the saloon business to the present proprietors.

It is not strange that the voters were deceived; they are used to it, in city politics especially. The whole scheme of municipal government in the United States is a system of checks and balances intended to restrain action on the theory that it is democratic. Consequently when a council proposes to restrain the saloons the voters think that must be a virtuous act and the majority approves.

I had an interesting conversation with Dr. Harry Lane, mayor of Portland, about a week before the election last June. He said to me, "The people think I am responsible for everything," and he sniffed with contempt at the idea of responsibility where other departments of the city government could over-ride or absolutely block his efforts. I was seeking information and I got it in dramatic fashion. The mayor closed his office door and walked up and down the room and told of the things he had tried to do, and how he had been opposed and defeated in matters most vital to the city's interest. It had all been done in a quiet and regular fashion according to law and the charter of the city. The system of checks was perfect and he could not even have the satisfaction of denouncing the business in public without being laughed at for denouncing the circumlocution office of Portland's municipal government. The mayor being a democrat and the offices filled with republicans, any criticisms from him would

be attributed to partisan feeling. That interview gave me a new point of view from which to study the city charter. It has been in force only four years and is supposed to embody the wisdom of experience. It gives the council power to legislate while the mayor has a qualified veto. The mayor appoints a large executive board that controls the departments of police, fire, streets, lighting, harbor, and pound. The police judge is elected by the people. Imagine the situation where the mayor cannot directly control the police; where the police judge is independent and responsible to himself alone and can consequently defeat half or more than half of the policy of the police department in legal fashion; where the council is paid but a trifle and is elected under party machine dictation which in turn may be controlled by business interests that want favors. Yet we fondly imagine that these checks and balances with the complete dispersion of responsibility is a triumph of democracy. Is it strange that voters take but little interest in elections? Is it strange that municipal government is the nation's shame? One thing is strange and that is that we fail to see that checks were designed to control autocrats and that when we impose them on the majority we destroy to that extent the will of the majority, and open the door to fraud and conspiracy under the guise of law and order and under its protection as well. Portland has a charter which provides for such a complete dispersion of responsibility that no office or department is responsible; it has the traditions of American cities; and now it has absolute independence with the right of legislation at the polls by the voters. What will they do with it? It is safe to predict that they won't do very much until the scheme of government is simplified. They have done nothing this year but show their confidence in the mayor at the price of party loyalty, but they have absolute freedom to conduct an interesting experiment in political science.

### III

The chief justification for attempting anything in the nature of a forecast is first the strong tendency among civilized people in democratic countries to approve of the theory of the referendum, and the fact that it has worked successfully enough in Oregon to point to certain conclusions. Mr. W. E. H. Lecky in his *Democracy and Liberty*, is an advocate for the adoption of the referendum in England. On page 291, in vol. 1, he says:

The referendum would have the effect of lowering the authority of the house of commons, which is now, in effect, the supreme legis-

lative authority in the empire. This is undoubtedly true, and, in my own judgment, it would be one of its great merits,

I have told the facts of Oregon's experience, but the vital question is, what do they mean? That is the query in Mr. H. G. Wells' book, *The Future in America*. He says our politicians are not thinking beings, though he makes an exception in the case of President Roosevelt, with such minor criticisms as may save the remark from being flattering. His own conception is that thought may form the molds in which may be constructed a state with some purpose beyond temporary expediency. Lecky suggests that "Society is a compact for securing to each man a peaceful possession of his property." The question arises if there is any overwhelming importance in government outside of liberty of property. The United States possesses it in a superlative degree. Put in other words that means the rule of the minority for their own benefit. The divine right of kings conveyed the idea in pious fashion, but as in the evolution of society the ruling minority has continually grown larger, the government scheme has become more democratic. How democratic shall it become? The Declaration of Independence and the Articles of Confederation contained promises which the Constitution of the United States in no way attempts to fulfill. Of that fact critical students are convinced, though there is a popular fallacy to the contrary. The common view is well expressed by Lecky in his *Democracy and Liberty*. "To the eminent wisdom of the Constitution of 1787 much of the success of the American democracy is due." The critical view must concede that the Constitution provides for the rule of the minority. If it were a highly virtuous minority democracy would need to go no further, but the existing abuses seem to disapprove the idea. Is the remedy more democracy? We have a certain type of it which can't remain stationary any more than other human affairs. The movement in Oregon originated in a general protest against the political boss who had become insufferable. To be sure his place has been taken by self-constituted leaders and the result has been that partisanship promises to become a personal matter instead of a party matter. That is a grievous thing to the old-school party leaders. They admit the sanity of the people when any clear-cut moral issue arises, but they profess to fear that the people won't select as good men for office as under the old régime.

Macaulay suggests as a terse definition of government that it is for the protection of persons and property. Burke goes to the root

of the matter when he says that the state is an emanation of the Divine Will. One cannot help but feel that both Macaulay and Burke did not condemn democracy in itself. What they did fear was that new institutions could not be successfully welded onto (if I may use the term) old institutions. The honor due to old institutions that had made the empire what it was, and the affectionate reverence for governmental traditions appealed to Burke and Macaulay both as a matter of deepest sentiment and of the most profound worldly wisdom. They loved and admired the old for what it had done and for its manifest merits; they feared and condemned the innovations of democracy because they did not harmonize with old traditions, and they found perfect justification for their fears in the failings and weaknesses of mankind, especially those who did not own property. They had a most keen realization of the fact that the struggle away from despotism had found its fiercest battle in trying to prevent an autocrat from confiscating the property of his subjects. To them it appeared as an axiom that the ruler would confiscate property if he had the power; and to propose a democracy as the ruling power was to advocate pillage by the mob. Lecky says it is the oldest and most important phase of battle for liberty to maintain rights of property and bequest against claims of ruling power.

Today there is the same fear of innovation in America that there was in England a hundred years ago. The democracy which aroused such fears protects property rights as securely as England ever did; so securely that an Englishman of today says we have no liberty but the liberty of property. Even Macaulay put persons before property and Burke used the solemn figure of speech that government is an emanation of the Will of God. He said that when George Washington was president of the United States. As the race is over a century older may we not agree that the will of men has a very definite place in the plan of government? If that is so the whole question resolves itself into the final query, "What is the destiny of man?"

I feel the less hesitation in going to the roots of the matter because Dr. Richard T. Ely, and the Honorable Carroll D. Wright, men whose services to the cause of political science in the United States cannot be estimated, have said in their books of recent years without apology and without hesitation that we must look to the spirit of religion in men to solve the economic and political problems of the race. I think that due recognition has not been given to the fact that that conclusion is the conclusion of scientific men. There is so much cant on the subject that scientific opinion gets classed with it unconsciously.

I offer my apologies in advance to the members of The American Political Science Association for reminding them of the fact that we are going to live after this phase of existence has passed, and that we are promised an eternity of bliss. I trust that pardon will be granted to me for the depressing suggestion, but the fact is a vital one in my argument. When survival comes to be recognized as a scientifically certain thing, it will prove beyond any question for a business people that this physical life ought to be made as complete as possible. We don't know about the other phases, but we do know about this one, and we know that a neglected or abused childhood destroys the possibilities of maturity. That suggests that perhaps the idea of democracy may be an emanation of the Divine Will. Sir Oliver Lodge in his latest book says in substance that it is the business of political science to devise an ideal state of society. Doubtless such a society would develop man's nature as a thinking and affectionate being. The real question is, are there other phases of existence which make it necessary for the most practical and business-like people in the world (as we flatter ourselves to be) to treat them as facts and endeavor to learn about them and make this cog in the wheel fit into the other spheres? In the *North American Review* recently a prominent bishop says that survival cannot be more than a belief and that it is better so. A belief that can never be more than a belief is certain to be much less in the long run. The late Daniel H. Chamberlain in another number of the *Review* says that survival is a scientific question. From that point of view there is an eminently respectable body of scientific men who assure us that for personal purposes they are convinced of survival. Sir Oliver Lodge leads in that opinion in England, while in America we have Dr. James H. Hyslop who expresses the same personal conviction. Personally, I think that any man with an open mind who examines the work of the scientists in this field must admit that another country will be discovered as completely some day as the use of steam has been discovered.

However, for all who believe that man is a spiritual being there must come the conviction that politics must devise an ideal society. The certainty that man is a spirit makes it a business necessity, though the belief without confirmation tends to make procrastination and hypocrisy most strikingly evident, as we all know.

As for Oregon's part in devising an ideal society, the results are entirely tentative so far. The few years of experience have shown that more democracy works well. The people are interested in public

questions and that will lead to working knowledge. It is their own State, their own business, their own future that is the subject of thought. Why shouldn't they be interested? It is true that probably 90 per cent of the people are American born; it is true that there is a sparse population and no immense cities; it is true that when Oregon's valleys and mountains and plains are filled with homes the reasonably good and moderately cheap government will meet new demands, though hardly of a new character. I might quote from Macaulay's essay on Mill.

The increase of population is accelerated by good and cheap government. Therefore, the better the government, the greater is the inequality of conditions; and the greater the inequality of conditions, the stronger are the motives which impel the populace to spoliation. As for America, we appeal to the twentieth century.

No American Jeremiah can condemn the innovation of more democracy more strongly than that, though he might feel impelled to defer the day of fate to the twenty-first century. Possibly that indicates a fallacy in Macaulay's reasoning which would be interesting to trace out.

For the American who knows something of the Russian Jews in New York City, or the inhabitants of some of the unhappy wards in Chicago, or the mining population in Westmoreland and Washington counties, Pennsylvania, the question of more democracy might be put in this way. Is a self-constituted leader (who may be a new world Peter the Hermit) any worse or any better than the present type of political boss? Is there a moral sense which discriminates between right and wrong among the poor and very ignorant, or is the class dominated by the impulse for spoliation?

## INHERENT AND ACQUIRED DIFFICULTIES IN THE ADMINISTRATION OF PUNITIVE JUSTICE

BY PROF. ROSCOE POUND

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That there is a general and well-grounded dissatisfaction with the administration of punitive justice in America, I shall take for granted. It is, if I may say so, a condition, not a theory. The criminologist complains that whereas the fear of punishment does not restrain crime,<sup>1</sup> it is none the less the chief reliance of law for protecting society; that whereas his science has shown the necessity of special institutions with expert management for many classes of delinquents,<sup>2</sup> the legal theory of ideal equality before the law leads criminal law to consign all offenders to a common prison; that whereas he has "demonstrated positively that crime is a disease,"<sup>3</sup> the law persistently deals with the criminal as a normal person. The sociologist complains that whereas the true purpose of punishment is protection of society, the basis of judicial punishment is revenge; that whereas the rights of society ought to be borne in mind continually, the law looks chiefly at individual rights; that whereas sociology has shown the necessity of study of the actual criminal, the law deals with him in the abstract and speculates over responsibility; that whereas the certainty, not the severity of punishment operates as a deterrent and protects society, the law provides for the latter and takes scant account of the former.<sup>4</sup> The plain citizen who, without scientific investigation, knows only that he pays taxes to maintain prisons, courts, sheriffs, constables, police, and public prosecutors, complains that notwithstanding the enormous cost—said to amount the world over to \$400,000,000 annually<sup>5</sup>—society is not protected, crimes are not punished, and lawlessness is general.

<sup>1</sup> Boies, *Science of Penology*, 77.

<sup>2</sup> *Ibid.*, 89.

<sup>3</sup> *Ibid.*, 90.

<sup>4</sup> See an excellent summary of the divergence between the legal and the socio-logical views in Kellor, *Experimental Sociology*, 231-232.

<sup>5</sup> Willoughby, *Social Justice*, 321.

It will have been observed that the complaints of the criminologist and of the sociologist are of general application, while those of the citizen apply only to the administration of punitive justice at home. And this suggests at once a distinction. Dissatisfaction with criminal law and its administration today is world-wide. In England, the Beck and Edalji cases have excited earnest discussion and a court of criminal appeal has been provided in consequence. In Germany there is widespread dissatisfaction.<sup>6</sup> In Italy there is a strong movement for reform.<sup>7</sup> America is, perhaps, unique only in complaining of inefficiency on the part of laws, courts, and prosecuting agencies. But it will be found that but a little way back in our legal history the criminal law was complained of as too severe and too vigorous, while still further back, its votaries were explaining delays and laxities. In the fifteenth century, Fortescue represents the prince as objecting that "the laws of England admit of great delays in the course of their proceedings, beyond what the laws of any other country allow of";<sup>8</sup> and the chancellor can only answer that "judgment is never so safe when process is hurried on," and tell a story of an innocent wife convicted and executed for the murder of her husband, the belated discovery of the real offender suggesting that her condemnation had been too hurried. In the seventeenth century, Coke, who rarely admits any imperfections in the common law, laments the frequent executions for felony, says that "we have found by woeful experience that it is not frequent and often punishment that doth prevent like offence," and urges preventive measures—education, teaching trades, and putting down of idleness.<sup>9</sup> In the eighteenth century, Blackstone, who was anything but a law-reformer, does not hesitate to say that in criminal law there are "particulars that seem to want revision and amendment."<sup>10</sup> It is manifest, therefore, that

<sup>6</sup> See the paper of Hugo Muench, Esq., *Year Book of Bar Assn. of St. Louis*, 1906, pp. 85, 106; Address of Dr. v. Liszt, Professor at Berlin, 1906; *Bar, Die Reform des Strafrechts, Jahrbuch der Internationalen Vereinigung für Vergleichende Rechtswissenschaft*, viii, 1.

<sup>7</sup> Conti, *L'Intervento della Difesa nell'Istruttoria*. Loria, *Economic Foundations of Society* (Keasbey's translation), 111-112. Sig. Conti states at the outset that Italian criminal procedure calls, not for amendment, but for thorough reform.

<sup>8</sup> Fortescue, *De Laudibus Legum Angliae* (written about 1453), cap. lii (Amos' translation).

<sup>9</sup> Coke, *Third Institute, Epilogue*.

<sup>10</sup> 4 Bl. Comm. 4.

dissatisfaction with criminal law and administration is not wholly a matter of time or place, but that there are inherent difficulties which must be reckoned with. How serious and how general these are, a writer on criminology bears unconscious witness when he says:

The more familiar one becomes with the details of the attempts of society to secure protection from criminals, from early times to the present, the more profoundly he is likely to be impressed with their inordinate cost and their inutility.<sup>11</sup>

One need not say that the existence of these inherent difficulties ought not to blind us to the real and indefensible obstacles to the administration of punitive justice in which American law and practice abound. But it does require us to examine each supposed defect critically and to see what is inherent and so beyond reach of immediate curative measures, and what is acquired, arising out of the history of our law or the environment of its administration, and so a proper subject of present remedies.

## I

On another occasion, I ventured to group the causes of popular dissatisfaction with *all* law under four heads: (1) The necessarily mechanical operation of rules and hence of laws, (2) the inevitable difference in rate of progress between law and public opinion, (3) a general popular assumption that the administration of justice is an easy task to which anyone is competent, and (4) popular impatience of restraint.<sup>12</sup> All of these causes operate to create discontent with the administration of punitive justice in all systems and at all times. But the last two have special consequences in criminal law.

"Most people," says Westermarck, "follow a very simple method in judging of an act. Particular modes of conduct have their traditional labels, many of which are learnt with language itself; and the moral judgment commonly consists simply in labeling the act according to certain obvious characteristics which it presents in common with others belonging to the same group. But a conscientious and intelligent judge proceeds in a different manner. He carefully examines all the details connected with the act, the external and internal conditions under which it was performed, its consequences, its motive; and, since the moral estimate in a large measure depends upon the regard paid to these circumstances, his judgment may differ

<sup>11</sup> Boies, *Science of Penology*, Preface.

<sup>12</sup> Causes of Popular Dissatisfaction with the Administration of Justice, Rep. Am. Bar Assn., xxix, 395.

greatly from that of the man in the street, even though the moral standard which they apply be exactly the same. But to acquire a full insight into all the details which are apt to influence the moral value of an act, is, in many cases, anything but easy, and this naturally increases the disagreement."<sup>13</sup>

The man in the street, regarding the administration of justice as an easy matter, to which he is quite as competent as the court, of course regards this disagreement as evidence of defects in the law or in its administration. Yet courts do not sit to register the judgment of the man in the street on such data as he has, but to do what the sober judgment of the community would dictate upon the basis of all the facts. Extravagant verdicts of juries, extravagant powers conceded to juries by statute or practice in many jurisdictions, and unfortunate curtailings of judicial power in jury trials, to which I must refer in another connection, have their roots in large part in this same popular obsession.

Popular impatience of restraint is aggravated in this country by theories of "natural law," which are by no means dead in political or in legal philosophy.<sup>14</sup> As a political tenet, they lead individuals to put into action a conviction that conformity to the dictates of their individual conscience is a criterion of the validity of a law. Accordingly, we find juries disregarding statutes in perfect good faith, we hear a sincere and, as he believes, law-abiding labor leader declare that he will not obey mandates of the courts which deprive him of his "rights,"<sup>15</sup> and we read from the pen of a well-known clergyman that a prime cause of lawlessness is the enactment of legislation which is at variance with the law of nature.<sup>16</sup> As a legal tenet, it confirms the bar in the orthodox common-law contempt for legislation.<sup>17</sup> Hence when business men apply popular notions of natural law to legislation which, as they think, makes it impossible to carry on business, they find the bar inclined by training and conviction to

<sup>13</sup> Westermarck, *Origin and Development of the Moral Ideas*, 9.

<sup>14</sup> See Dos Passos, *The American Lawyer* (1907), 168; Hughes, *Datum Posts of Jurisprudence* (1907), 106.

<sup>15</sup> Labor Day address of Mr. Gompers, see Associated Press dispatches of September 3, 1907.

<sup>16</sup> See article by Dr. Parkhurst in *Munsey's*, January, 1908.

<sup>17</sup> For the attitude of the common-law lawyer toward legislation, see Carter, *Law, Its Origin, Growth and Function* (1907); Dos Passos, *The American Lawyer* (1907), 169; Hughes, *Datum Posts of Jurisprudence* (1907); Sharswood, *Professional Ethics*, 5 ed., p. 23; Judge Parker's Address, Rep. Am. Bar Assn. xxix, 383.

sympathize, to regard statutes as inferior forms of law to be warped and moulded by interpretation, and to regard counsel as to safe modes of evasion as in every way legitimate.

Inherent difficulties, peculiar to punitive justice, appear to me to be six: (1) public desire for vengeance when a wrong has been done, which the law is compelled to satisfy; (2) the close contact of criminal law and administration with polities; (3) the inherent unreliability of evidence in criminal causes; (4) the wide scope for discretion necessarily involved in the administration of punitive justice; (5) the intrinsic inadequacy of the chief deterrent upon which punitive justice must rely, and (6) the popular tendency to throw too great a burden upon criminal law—to attempt to do too much by means of it. Let us look briefly at each of these.

(1) Revenge, satisfaction of a desire for vengeance, is no longer regarded as a legitimate end of punishment by moralists or sociologists.<sup>18</sup> But jurists are by no means agreed. The prevailing view is doubtless coming to be in accord with that of the sociologists.<sup>19</sup> Yet there are many who insist upon the retributive theory in one form or another,<sup>20</sup> and common-law jurists, whose point of view is commonly analytical, insist upon it and regard satisfaction of public desire for vengeance as a legitimate as well as practically necessary end.<sup>21</sup> This disagreement as to the end of punitive justice is reflected in legislation. Not merely do statutes enacted at different periods proceed upon different theories, but the adherents of one theory will procure one measure and those of a different theory another from law-makers who have no theory of their own. Hence, what is true of all American legislation is even more true of American criminal legislation.

There is no one thing in all the departments of government or business that is carried on with less scientific or orderly method than the making of laws.<sup>22</sup>

<sup>18</sup> Ward, *Dynamic Sociology*, ii, 365; Ross, *Social Control*, 107, 111; Willoughby, *Social Justice*, chap. x.

<sup>19</sup> v. Liszt, *Lehrbuch des Deutschen Strafrechts*, secs. 13, 16; Kohler, *Einführung in die Rechtswissenschaft*, sec. 77; Lorimer, *Institutes of Law*, 311; Salmond, *Jurisprudence*, sec. 24.

<sup>20</sup> Merkel, *Lehrbuch des Deutschen Strafrechts*, sec. 79; Hastie, *Outlines of Jurisprudence*, 90.

<sup>21</sup> Holmes, *Common Law*, 41; Stephen, *History of the Criminal Law of England*, chap. xvii; Kennedy, *The State Punishment of Crime*, Rep. Am. Bar. Assn., xxii, 312.

<sup>22</sup> Griggs, *Lawmaking*, Rep. Am. Bar Assn. xx, 243.

Conflicting theories are at work in administration also. One magistrate paroles freely. Another condemns the system of parole. One executive pardons freely, another not at all. One jury is stern, applies the revenge theory as like as not; another is soft-hearted. And so the fact that we are not all agreed, nor all of us in all our moods, upon the end of punishment, infects both legislation and administration with uncertainty, inconsistency, and in consequence, inefficiency. But it is not the worst feature that criminal legislation and administration are rendered inconsistent and unsystematic. All attempts to better the law and to bring it into accord with the views of moralists, sociologists and criminologists, have to reckon with a deep-seated popular desire for revenge. Every practitioner knows that the average client, even in mere civil injuries, is anxious to begin a criminal prosecution. He is not satisfied to sue civilly and obtain compensation for the injury. He insists on something that will hurt the wrongdoer, and is willing to pay liberally to that end. We have been a long time eliminating the revenge element from the civil side of the law. On the criminal side it is still vigorous. In order to prevent self-help and to meet the demands of the moral sentiment of the community, it is necessary to retain much that is purely retributive. The law should, of course, reflect the sober views of the community, not those of the community when momentarily inflamed. But the sober views of the average citizen are by no means so advanced on this subject as to make a purely scientific system possible.

(2) Again, criminal law has a much closer connection with politics than the law of civil relations, and this operates to its disadvantage. There is little danger of political oppression through civil litigation. There is constant fear of political oppression through the criminal law. Not only is one class suspicious of attempts by another to force its ideas upon the community under penalty of prosecution, but the power of a majority to visit with punishment practices which a strong minority consider in no wise objectionable is liable to abuse, and whether rightly or wrongly used, puts a strain upon criminal law and administration. Moreover, the close relation of administration of the criminal law to politics tempts prosecuting officers, when the public conscience is active, to be spectacular at the expense of efficiency,<sup>23</sup> and when it is sluggish, to be lax for fear of offending domi-

<sup>23</sup> Maine has observed that the necessity of being interesting has no small effect upon government. *Popular Government* (American edition), 147. This necessity of furnishing news and keeping before the public is the destruction of American prosecutors.

nant interests. But so intimate is the relation between criminal law and polities we can scarcely hope for extension of civil service principles to these officers.

(3) Inherent unreliability of evidence affects all departments of judicial administration of justice. But in criminal law, where passions are aroused, where consequences are often so vital, where unscrupulous persons are apt to be arrayed on each side, and where the legal effect of slight variations in the facts may be so far-reaching, the difficulties growing out of the necessity of relying upon human testimony are very grave. Modern study of the psychology of evidence has not gone far enough to be available for the jurist. The studies of Binet, Claparede and Münsterberg make us conscious of the infirmities of the instrument we are compelled to use, but their juridical applications have yet to be made. Moreover, in criminal law the inherent unreliability of evidence is aggravated by police *esprit de corps*. To the determination of the police to convict innocent men whom they believed to be guilty, the unfortunate convictions in the Beck and Edalji cases in England were clearly traceable. The testimony of English practitioners of experience is uniform to the effect that the testimony, upon which all prosecutors have to rely in large part, is apt to be so colored and warped as to be subject to grave doubt.<sup>24</sup> Serjeant Ballantine, whose long experience in prosecuting and defending entitles him to speak with authority, says that *esprit de corps*, antipathy toward the criminal classes, the habit of testifying, so that it ceases to be regarded as a serious matter, and the temptation officers are under to communicate opinions or theories to the press, thus "pledging themselves to views which it is damaging to their sagacity to retract," so operate as to cause serious and even fatal miscarriages of justice.<sup>25</sup> Yet from the nature of the case, such testimony is the best available.

(4) Another inherent weakness in punitive justice is the greater scope for discretion it involves as compared with adjustment of civil relations. To maintain a due proportion between detailed rules and judicial discretion is one of the difficult problems of all law. But in criminal law there are two circumstances that require a wide discretion on the part of prosecutors and magistrates. In the first place,

<sup>24</sup> Montagu Williams, *Leaves of a Life*, chap. ix; Serjeant Ballantine, *Some Experiences of a Barrister's Life*, chap. xxvii; Harris, *Hints on Advocacy*, chap. iv, secs. 13, 14.

<sup>25</sup> Ballantine, *Some Experiences of a Barrister's Life*, 6 ed., 227.

the moral or ethical element plays a large part in criminal law; and purely moral or ethical matters do not lend themselves to strict rules. In the second place, the impossibility of a mathematically-constructed system of penalties compels reference of a most important part of criminal administration almost wholly to magisterial discretion.<sup>26</sup> Unfettered discretion is liable to abuse in the best of hands, as notorious inequalities in sentences bear daily witness. And yet, if the magistrate is tied down by minute rules, it is inevitable that the elements eliminated in arriving at the rules will be of controlling importance in particular cases and hence that injustice will result.

(5) We are told that "scientific penology proclaims it as law that the fear of punishment does not restrain crime."<sup>27</sup> But fear is the chief deterrent upon which criminal law must rely to protect society.

"In dealing with a disturber," says Professor Ross, "society has two objects, to avoid further harm from this man, and to guard itself against would-be offenders."<sup>28</sup>

The latter object is achieved by creating a widespread fear of punishment. Preventive justice, in any country governed by common-law constitutional notions, must be confined within very narrow limits. The criminal law can only step in, as a rule, after an offence has been committed. The attempt to protect society through creating a general fear of punishment, however, encounters two inherent difficulties. In the first place, as has been said, fear can never be a complete deterrent. The venturesome will always believe they can escape. The fearless will always be indifferent whether they escape. The crafty will always believe they can evade, and enough will succeed to encourage others. Secondly, threat of punishment is very apt to become *brutum fulmen* and defeat itself. Legislative zeal frequently imposes penalties that jurors will not subject men to. It often defines acts as criminal for which jurors will not agree to see men punished. In consequence our statute books are full of dead-letter laws, which weaken the authority of all law and destroy the efficacy of fear as a deterrent. Even if such statutes do not become dead letters, they fail of effect in two other ways which weaken the authority of law. In endeavoring to enforce them the law may be warped to secure conviction, as in communities where courts of equity

<sup>26</sup> See a discussion of this in Bentham, *Theory of Legislation* (Hildreth's translation), 326.

<sup>27</sup> Boies, *Science of Penology*, 77.

<sup>28</sup> Ross, *Social Control*, 107.

are used to administer prohibitory laws, thus advertising to the world that criminal law is ineffectual. Or instead, where courts do not sympathize with such statutes, the law may be warped to prevent conviction. Our criminal procedure is still suffering from the astuteness of judges of past centuries to avoid convictions at a time when all felonies were punishable with death.<sup>29</sup>

(6) Finally, there is always a tendency to try to do too much through the agency of criminal law. Criminal law has a great attraction for the lay mind. The layman's short and simple cure for all ills is to hurt somebody. Hence the legislator is apt to forget or to be ignorant of the fundamental distinction that ethics deals with *being* and law with *acting*. He is likely to try to make men better through the criminal law, to try to turn the criminal law into a general agency for propagating morals, and to try to make it do the work of administration. A great part of the strain upon criminal law in America is due to such legislation.

## II

Let us turn now to those obstacles to the due administration of punitive justice which are not inherent, but have been acquired in the history of our legal system generally, in the history of our criminal law and procedure in particular, or in the circumstances—the environment—of judicial administration in America. One might well take them up in this order and consider them historically. But for our purpose, which I take to be one of diagnosis purely, it seems better to group them under three main heads: (1) those lying in the common-law legal system, (2) those lying in American judicial organization and procedure, and (3) those lying in the environment of administration of criminal law in America. I have considered the causes for dissatisfaction with the administration of justice generally in America which are referable to each of these heads on another occasion.<sup>30</sup> It remains to point out those which operate specially in criminal law and procedure.

1. Of the obstacles to due administration of punitive justice which lie in our common-law legal system, three affect all judicial administration of justice, namely (i) divergence between the legal theory of justice and current conceptions thereof, (ii) common-law jealousy

<sup>29</sup> Stephen, *History of the Criminal Law of England*, i, 470.

<sup>30</sup> Causes of Popular Dissatisfaction with the Administration of Justice, Rep. Am. Bar. Assn., xxix, 395.

of legislation and the survival of narrow ideas as to interpretation, (iii) unsystematic and spasmodic legislation; while three others operate specially in criminal law, namely, (iv) the common-law distrust of administration, which results in putting upon criminal law much that is properly administrative, (v) the common-law theory of individual initiative in prosecution, and (vi) the common-law theory of crimes, which is unquestionably a retributive theory.

(i) The common law assumes equality among all men of legal capacity; it assumes that justice consists in leaving to them the greatest possible freedom of action and in preventing aggression by others. In an excellent work recently reprinted by the American Bar Association and distributed to its members, an eminent judge says:

The sole legitimate end and object of law is never to be lost sight of—security to men in the free enjoyment and development of their capacities for happiness.<sup>31</sup>

Probably I need not say that this is not at all the conception of sociologists,<sup>32</sup> and I have endeavored in another place to show a gradual shifting from this position in the law itself.<sup>33</sup> In a crude way, juries are continually attempting to apply a newer standard of justice, but half-grasped, and the result is shown in many otherwise inexplicable verdicts.

(ii) In a subject in which judicial law-making, as an agency of growth, is necessarily precluded, in which, therefore, legislation must needs be our chief reliance, common-law jealousy of legislation and the survival of narrow ideas as to interpretation cannot fail to operate unhappily. The classical authorities of the common law wrote and judged at a time when there was scarcely any legislation. What there was, was mere skeleton, to be clothed upon with the flesh and blood of judicial decision. Moreover, the dogmatic confidence of Coke, whose reports and institutes have had a lasting influence on the political side of the common law, could ill tolerate any legislative interference with matters that he regarded as governed in the nature of things by the common law. Hence, it became settled that statutes in derogation of the common law were to be construed strictly, and

<sup>31</sup> Sharswood, *Professional Ethics* (5 ed.) 22. See some further examples noted in my address, *The Need of a Sociological Jurisprudence*, *Green Bag*, xix, 607, 612; also Vaccarol, *Genesi e funzione delle leggi penale*, 101.

<sup>32</sup> Ward, *Applied Sociology*, 22-24; Willoughby, *Social Justice*, 20-25.

<sup>33</sup> *The Need of a Sociological Jurisprudence*, *Green Bag*, xix, 607.

that legislation, as far as possible, was to be deemed declaratory; in other words that the fundamental dogmas and maxims of the common law were beyond legislative reach. Bench and bar acquire this view of legislation in the rudiments of legal education, and its persistence,<sup>34</sup> and public toleration of it in an age of legislation is one of the remarkable facts of legal history.

(iii) Unsystematic and spasmodic legislation undoubtedly contributes to keep vigorous the common-law doctrines as to statutes. Thus the great mass of slovenly legislation prevents what really good legislation we have from taking full effect. But worse than this, our habits of piecemeal legislation make criminal codes absurd from want of proportion. There will be comparatively trivial felonies and grave misdemeanors. The punishment for selling cigarettes will be as heavy as that for bribery, and heavier than that for many forms of graft.<sup>35</sup> In one State, there was till recently no effective statute to reach blackmail, but in the same jurisdiction a fine of \$1000 may be visited upon the giving away of a cigarette.<sup>36</sup> American criminal legislation is getting into the same condition in which English criminal law found itself one hundred years ago, a "heterogeneous mass concocted too often on the spur of the moment."<sup>37</sup> It is no wonder that the common sense of jurors leads them to take the law into their own hands in such a situation.

(iv) A more serious difficulty is to be found in the common-law distrust of administration, which results in putting upon criminal law much that is purely administrative, for which its methods and machinery are ill adapted. The two rival agencies in government are law and administration.<sup>38</sup> Administration achieves public security by preventive measures. It selects a hierarchy of officials to each of whom definite work is assigned, and it is governed by ends rather than by rules. It is personal. Hence, it is often arbitrary and is subject to the abuses incident to personal as contrasted with impersonal or law-regulated action. But well exercised, it is extremely effi-

<sup>34</sup> See Carter, *Law, Its Origin, Growth and Function* (1907); Parker, Address as President of the American Bar Assn. (1907), xix *Green Bag*, 581; Parker, The Congestion of Law, Rep. Am. Bar Assn., xxix, 383 (1906); Dos Passos, *The American Lawyer*, 169 (1907); Hughes, *Datum Posts of Jurisprudence* (1907).

<sup>35</sup> See a vigorous discussion of this same fault in public thought by Professor Ross, *Sin and Society*, 89.

<sup>36</sup> Laws of Nebraska, 1901, chap. 95; Laws of Nebraska, 1905, chap. 198.

<sup>37</sup> Stephen, *History of the Criminal Law of England*, i, 470. Colquhoun, *Police*, 7.

<sup>38</sup> See a good contrast of these agencies in Amos, *Science of Law*, 396.

cient; always more efficient than the rival agency can be. Law on the other hand operates by redress or punishment rather than by prevention. It formulates general rules of action and visits infractions of these rules with penalties. It does not supervise action. It leaves individuals free to act, but imposes pains on those who do not act in accordance with the rules prescribed. It is impersonal, and safeguards against ignorance, caprice or corruption of magistrates. But it is not quick enough or automatic enough to meet the requirements of a complex social organization. One of the inherent difficulties in all administration of justice is to steer a middle course between discretion and strict rule. One acquired difficulty is that the common-law polity, through jealousy of arbitrary executive action and fear for individual liberty, restricts administration within the narrowest limits possible and imposes on the courts work that is really administrative, which they cannot do effectively under industrial conditions of today. To take but one example, prosecutions for manslaughter and for violations of miners' acts and actions for damages are proving no protection at all to American miners.<sup>39</sup> Laymen do not appreciate the strain upon criminal law due to this cause. In Illinois, the statute-book provides for 747 distinct crimes, exclusive of offences under municipal ordinances. Of these, 443 are contained in the criminal code. The remaining 304 are in recent enactments and are nearly all administrative matters. It is self-evident that the 304 provisions deprive the 443 of much of their efficiency, if only by detracting the time of courts and prosecutors.

(v) The common-law theory of prosecution is another serious obstacle to efficient administration of punitive justice in a modern community. It is intensely individualistic. Its main tenets are local jurisdiction and private initiative. A crime may only be dealt with where the act was committed. Hence localities are enabled to oppose their interests or their prejudices to general laws demanded by the State at large, and acts which take effect across State lines present insuperable jurisdictional difficulties.<sup>40</sup> Prosecutions are to be instituted by persons injured; hence it is no business of officials to stir till complaints are made. In practice, the common-law theory is breaking down utterly. Public prosecutors are to be found everywhere,

<sup>39</sup> For another example, see Montagu Williams, *Later Leaves*, chap. xxv. The new mode of enforcing the liquor laws in Maine shows the efficacy of administration.

<sup>40</sup> *State v. Hall*, 114 N. C., 909; *Jones v. Leonard*, 50 Ia., 106.

and the community refuses to listen to the officer who says "file complaints." The result is to make administration of criminal law unequal and spasmodic. Legal theory contemplates that officers shall await individual initiative. The public take it that they are to be inquisitors and are to act of their own motion.

(vi) The common-law theory of crimes is essentially retributive. Hence it requires as elements of a crime both act and intent. But modern statutory crimes, created to protect society, are made nugatory if intent is insisted upon. Hence courts have come, not without a struggle,<sup>41</sup> to eliminate intent as a necessary element in many statutory offences. How far and when courts will do this, however, depends largely upon the sympathy or want of sympathy of the judges with the act before them, and in consequence an unfortunate element is brought into our criminal law. Undoubtedly, as Professor Ross has said,<sup>42</sup> to deal with crime in an intelligent and practical manner we must give up the retributive theory. But that theory is taught as among the *fundamenta* of law.

2. Difficulties in administration of punitive justice lying in American judicial organization and procedure which are of general operation are, briefly stated, archaic judicial organization and ultra-technical procedure. On the criminal side of the law, the effects of these difficulties are even more marked than on the civil side, and the chances of improvement are much less. Fear of political use of criminal law and of impairment of individual liberty makes for extreme conservatism in reform of criminal procedure. But the want of a modern judicial organization operates continually against liberty and equality. Only a rich man or an absolute pauper can procure a transcript and bill of exceptions, not to mention payment of fees of counsel. This alone is a previous source of inequality in our administration of punitive justice. Matters of less moment are want of organization of the legal profession and want of form or dignity in the external conduct of judicial administration of justice. As the bar is unorganized, without discipline and easy-going, there is no check upon the sporting-theory of justice, no check on the disposition to fight in every way to save a client. Unchecked abuses introduced into criminal practice by unscrupulous lawyers have made it fashionable to avoid this

<sup>41</sup> Indeed on the whole question as to whether absence of intent may be shown as a defence in a prosecution for violating statutory regulations, the authorities are irreconcilably in conflict," McClain, *Criminal Law*, sec. 128.

<sup>42</sup> *Social Control*, 109.

branch of the law. To say that one is a criminal lawyer is to imply a low rank in the profession.<sup>43</sup> It is obvious that this situation does not conduce to the best administration of punitive justice. The indecorous informality of American State courts must also be counted as a minor cause of inefficiency in administration of criminal law. Sociologists understand the advantage of form and dignity in judicial proceedings,<sup>44</sup> even if lawyers do not. And there are encouraging signs of a changed attitude on the part of the bar.<sup>45</sup>

The difficulties just spoken of affect all judicial administration. Six others are to be noted which specially affect criminal law and procedure, namely, (i) the complicated machinery of prosecution, necessarily entailing delays, (ii) the excessive powers delegated to or usurped by juries, (iii) the needless limitation or even cutting off of the power of trial judges to control the trial and hold the jury to its province, (iv) the lack of any legal means of interrogating an accused, (v) the practice of beginning all prosecutions for the most trivial misdemeanors with arrest, and (vi) rotation of judges so that none become specialists in the administration of punitive justice.

(i) Ill effects of the complicated, expensive and time-consuming machinery of a common-law criminal prosecution were pointed out long ago by Bentham.<sup>46</sup> To be a deterrent, punishment must visibly follow crime. But it is common knowledge that American administration of criminal law fails wholly in this respect. Here English judicial administration is a model. Nor should we be put down by reference to notable miscarriages of justice which have occurred recently in that country. In the Beck and Edalji cases, police zeal, mistaken identity and circumstantial evidence would have procured the same convictions under American methods. And as to the Maybrick case, which is chiefly relied on by American opponents of reform, it is to be said that every one who has fairly studied the evidence must concur in the verdict.<sup>47</sup>

(ii) A prime source of inefficiency and inequality in enforcement of the criminal law in America lies in the excessive—one may well say

<sup>43</sup> See some observations on this point in Dos Passos, *The American Lawyer*, 166.

<sup>44</sup> Ross, *Social Control*, 113.

<sup>45</sup> See Proceedings of Joint Sessions of the Bar Associations of Texas and Arkansas, 1906, 326.

<sup>46</sup> *Theory of Legislation* (Hildreth's translation), 422.

<sup>47</sup> Beale, *The Psychology of Poisoning*, xiii, *Green Bag*, 5. See note by Professor Gray, 20 *Harv. Law Rev.*, 82.

extravagant—powers which we delegate to juries or permit them to usurp. Some States expressly make juries judges of law as well as of fact in criminal prosecutions, so that counsel boldly appeal to them from the trial judge, read law books to them and obtain from them verdicts that State statutes may be superseded by city ordinances or that they may become obsolete by executive non-enforcement.<sup>48</sup> Even where such absurd legislation does not exist, jurors are permitted to pass upon the consequences of the facts as well as the facts, and there is no effective means of holding them in check. Jurors ought to have nothing to do with the question of punishment. They will be lawless enough without encouragement; they will be certain enough to confuse their function with that of the court, unless the court has the power to set them right. But with us not only is the court rigidly tied down, but counsel in a long *voir dire* examination canvass the ethical, legal, and political phases of the cause with each juror till it is no wonder he forgets his function, if he ever knew it, and that sentiment, pity, and all that may go to the question of punishment are applied to the facts with which they have nothing to do. The so-called unwritten law flourishes in such an atmosphere. It is true there are signs of reaction from the unwritten law. In addition to the Thaw disagreement, there have been two convictions recently in cases fully within its letter and spirit. But this very reaction shows how unequally extravagant powers of juries operate in practice. An obscure Italian woman is convicted. Mrs. Bradley is acquitted. So far from being a bulwark of liberty, extravagant power in juries is an intrenchment of inequality. Ability to hire eloquent counsel becomes the controlling factor. The way to keep out sentimentality and to prevent advocacy from becoming the determining element in trials is to limit the inquiry of the jury to the facts, to exclude all else rigidly, and to leave the consequences of the facts to be dealt with by the court. In England the trial judge asks the jury orally what they find on each of the crucial questions of fact. Then he tells them that their verdict amounts to guilty or not guilty as the case may be, and it is so recorded. With us, a general verdict is returned on the whole case.

(ii) Closely connected with the foregoing, and, in fact one of the causes of jury-lawlessness, is the limitation upon the power of trial

<sup>48</sup> The Sunday closing cases in Chicago were argued to two juries on these lines, and one jury adopted the arguments. Since the foregoing was written, five juries have disagreed in these cases in the face of a plain statute.

judges which has become well nigh universal in this country. Extravagant theories of democracy, desire of counsel to have a free hand unrestrained by a court interfering with a fair fight in the interest of mere justice, and timidity of elective judges have combined to deprive the judges of all substantial control of trials. Nothing is more effective in neutralizing the advantage of skilful advocacy and guarding against befogging or deceiving of the jury than a fair but vigorous summing up and oral charge by the court. That there is no danger that courts will lead juries by the nose, is shown in England, where juries not infrequently go counter to the views of the judge on the facts. But when they do so, they do so intelligently. Under our practice, the only impartial auditor who could advise the jury must keep silence. It is gratifying to note in the reports of the several State bar associations a growing tendency to call for restoration of the powers of trial judges.<sup>49</sup>

(iv) Another serious difficulty in our criminal procedure is the lack of any *legal* mode of interrogating the accused. Hence the rich malefactor takes the advice of counsel, shuts his mouth, and leaves the prosecution to prove what it may. The poor malefactor is "sweated" by the police till some sort of confession is extorted. Immunity of accused persons from all interrogation, if they are firm, well-advised, and able to give bail, is a most effective shield of wrong-doers. Knowledge of this leads police and detectives into lawless modes of getting what cannot be had lawfully whenever the poor and defenseless are in their custody. Granting all that may be said as to the abuses to which a legal form of interrogation is liable, the fact remains that the common-law immunity operates unequally and invites oppression and lawlessness. Is it not better to have some legal mode of interrogation, under legal restrictions, than to compel officials to violate legal rights in order to enforce the law?

(v) Still another cause of inequalities and oppressions in the administration of criminal law is to be found in adherence to the old practice of beginning all legal proceedings with arrest, in case of trivial misdemeanors. Civil procedure was long guilty of the same stupidity. It took a long time to learn that a judgment by default was as effective as any other. Arrest, imprisonment and bail as a mode of beginning prosecutions for trifling offenses is an anachronism.

<sup>49</sup> Proceedings, Ill. State Bar Assn., 1906, 18; 1903, 92, 120; Report Ga. Bar Assn. 1906, 257; Proceedings, Ky. State Bar Assn., 1905, 80; Proceedings, Oregon Bar Assn., 1900-1903, 85.

The purpose is to secure the appearance of the accused at the trial. But a summons would answer that purpose quite as well. The bad effects of the present system are three: (1) it makes officials hesitate to prosecute where they ought to do so, because of the arrest involved; (2) It gives great scope for police oppression by arrest at hours when no magistrate is at hand to take a recognizance and consequent imprisonment for breach of some insignificant ordinance until a recognizance can be taken; (3) It operates unequally because a poor or unknown accused, who may be innocent, is made to suffer a humiliating imprisonment for a trivial misdemeanor for which a small fine is ample punishment.

(vi) Lastly, the American system of rotation of judges, so that none become specialists in the administration of punitive justice, produces unequal sentences and is a prolific cause of reversals for error in the record. Mr. Harris gives an amusing account of the workings of a like system in England when the judicature act took effect.<sup>50</sup> The extent to which sentences depend on the temper and disposition of the individual judge, is notorious.<sup>51</sup> This difficulty may be mitigated by experience on the part of the judge. When he is systematically prevented from acquiring experience, it is obviously aggravated.

3. Of the difficulties lying in the environment of the administration of punitive justice in America, there is time to say but little. I have enumerated those which affect judicial administration of all kinds on another occasion.<sup>52</sup> Suffice it to say here that our criminal law is injuriously affected by (i) popular lack of interest in justice, which makes jury service a bore and the vindication of right and law secondary to the trouble and expense involved, (ii) the atmosphere of sentimentality and sensation that surrounds criminal trials, (iii) public ignorance of the real workings of courts due to ignorant and sensational reports in the press, and (iv) the unfortunate practice of newspaper comment upon pending causes which necessarily interferes with equal administration of justice.<sup>53</sup>

<sup>50</sup> *Farmer Bumpkin's Law Suit*, chap. xiv.

<sup>51</sup> See a discussion of this in Ballantine, *Some Experiences of a Barrister's Life*, chap. xix.

<sup>52</sup> Rep. Am. Bar. Assn., xxix, 415.

<sup>53</sup> See Code of Legal Ethics of Alabama, State Bar Assn., sec. 17, adopted in Colorado, Georgia, Kentucky, Maryland, Michigan, Missouri, North Carolina, Virginia, West Virginia and Wisconsin; Warvelle, *Legal Ethics*, sec. 108.

Summing up the results of this investigation of the difficulties under which our administration of punitive justice is laboring, it will be seen that we must look for relief partly to general improvements that will be long in coming, and partly to specific improvements which may be made at any time. General improvement will come through better general education in sociology, leading the public to abandon the retributive idea and the man in the street to desist from his demand for revenge; through such institutions as the legislative reference bureau in Wisconsin and the newly-instituted comparative law bureau, leading to more intelligent legislation and less haphazard patchwork; through the bringing forth of judicial specialists in criminal law and administration, whereby inequality of sentence is reduced to a minimum and intelligent, scientific understanding of the problems of criminology is applied to each case; and through a better educated and better organized bar, ridding us of ultra-contentious procedure, of the idea that common-law doctrines inhere in the nature of things, and of repugnance to legislation and inclination to defeat it. Specific and immediate improvement may be had: (1) by curbing the unbridled power of the advocate, giving to the judge the power to make an effective charge, to give the jury the benefit of his experience by fair comment on the evidence, and to point out sophistry and bunccombe addressed to them by counsel; (2) by limiting the jury to their proper function of finding the facts, and giving the court power to hold them to it; (3) by giving the State power to obtain effectual review of prejudicial errors at the trial and refusing to apply the rule as to double jeopardy till the cause has been completely adjudicated; (4) by modifying the rule as to self-incrimination, at the same time guarding against unreasonable searches and seizures; (5) by ceasing to grant new trials except where the reviewing court believes the verdict wrong on the whole case, and finally, (6) by providing a more modern and flexible judicial organization and more simple and business-like procedure.

## PROBLEMS OF TRIAL BY JURY

BY JAMES E. BABB

No person can pass from the praise of trial by jury delivered by Sir William Blackstone, and recorded in the *Federalist*, Elliott's debates and the other discussions at the time of the adoption of the Constitution, to the criticism found in the discussion of the last ten or fifteen years, without a fixed impression that a most serious change has taken place in a vital function of government. (*World's Work*, vol. 13, 8221; *Arena*, vol. 33, 510; *Harper's Weekly*, vol. 49, 1005; *Century*, vol. 59, 802; 29, *Munsey*, 723; *77 Nation*, 106; *5 International*, 1; *87 Nation*, 163; *62 Gentlemen's Magazine*, n. s., 189; *22 Arena*, 312; *98 Spectator*, 890; *3 Forum*, 102; *9 Forum* 309; vol. 1, Report of American Bar Association, 1906, 450; Report of American Bar Association 1905, 15 to 32; Report of Universal Congress of Lawyers and Jurists 1904; 96; *17 Law Quarterly Review*, 171, Address of James Bryce, American Bar Association, 1907).

Intermingled with criticism are comments of a more favorable character from men of eminent qualifications, both of equipment and experience. (Report of Universal Congress of Lawyers and Jurists, 1904, p. 105; Address of Joseph Choate before the American Bar Association in 1898).

Reading the criticisms that have been made creates a firm conviction that there has been much of error and wrong in trial by jury.

So great has this been that some, among them even a distinguished ex-attorney-general of the United States have called for its abolition.

These criticisms most generally pertain to trials in civil cases though some of the most serious instances given of miscarriage of justice were in criminal cases.

The growth of democracy from the time when jury service was almost the exclusive official function of the people, to the present, when after over a century of exercise of the elective franchise, the people are demanding direct participation in legislation through the referendum and in nomination of candidates for office and the adoption of political platforms and choice of United States senators, and even the

extension of trial by jury to additional classes of cases, argues that trial by jury will exist as long as popular government.

A theoretically perfect trial is no more to be expected by a jury than theoretically perfect government is to be expected in a democracy, unless the democracy be one ideally perfected in intelligence and morality. From such trials and from such government we get the product, not of the most skilled, but only of the average man, the development and perfection of whom is the chief object of our institutions.

We find, therefore, perhaps no more of error and wrong taking place in trials by jury than are found in our legislatures, executive and administrative officers. In the largest sense, therefore, fundamentally the difficulties which we meet in the jury system are met in every department of government, and the fundamental remedy for these defects is the intelligence, morality and fidelity of the people, for which we must look to the home, the school and the church. No class can be immune from the effects of the votes of electors and jury-men. The production of a high grade of average man is oursalvation.

Coming directly to the machinery applicable to the jury system alone, the evils are a combination of defect in regulation and administration, and the chief of these, which in some instances is a defect of regulation, and in others of administration, is the desertion of jury duty.

In many, and doubtless most, of the States men occupying the higher positions in all lines of activity have successfully, and practically totally, evaded jury service, and from this class, has come the main criticism upon jury trials. They seem to have overlooked the fact that the criticism aimed at others must necessarily rebound upon themselves; that if they had discharged their duties, almost every jury would contain upon it sufficient of them to prevent, in any case, a verdict representing in an extreme sense, class, corporate or social prejudice, or bias, or misconception of the evidence. While the law contemplates a fair distribution of jury service, it will be found that the officers having to do with its execution, find themselves under severe criticism if they force upon the jury list a man whose time is of unusual value, and at the same time these officers selecting such a man for jury service would receive additional criticism from the professional juryman, who has been watching for the place and who has thus been displaced. The officials having to do with the selection of jury lists have found the burden of double criticism too much

endangers success at the primaries and elections, and aided, as well, by a spirit of accommodation, have drifted into the practice of passing over the names of those who would be offended at being called, and of placing upon the lists those who would consider the opportunity one of comfort, satisfaction and profitable employment, and occasionally, perhaps, and there is always a possibility that considerations much more dangerous control the officer's discretion.

In this we have the chief cause of current failures in jury trials. This disloyal, and rather discreditable desertion of public duty has found excuse, not only, in serious interference with important business duties, but in the almost barbarous, as well as unhealthful, treatment to which the juror in service is subject, also in the insufficient compensation which attaches to the service.

The service is one, unavoidably, most arduous, and inconvenient. It comes of a sudden, it is so temporary as not to justify sufficient preparation for its interferences with other duties, and at times it subjects to a life, practically of imprisonment. It is a duty, however, fundamental and essential and not to be evaded, any more than military service in time of war. This desertion of jury duty is similar to that of electors in failing to register and vote. In a popular government the discharge of these duties is vital and must be exacted. In time of war all expect, and readily submit to the propriety of the most instant and severe punishment of the smallest infractions of military duty. We have failed in the conception that there is ordinarily as much of importance dependent upon the proper discharge of the duty of elector and of juryman as there is upon the discharge of picket and other military duty in time of war. Our government never can meet its responsibilities until there is a common understanding and recognition that the duties of jurymen and electors are as sacred, as important, to be enforced as instantly and with punishment as adequate, as that administered for the enforcement of military duty. This evasion of service has created and brought into existence the professional juryman.

The difficulty must be reached by an amelioration of the conditions of jury service and the prevention of its further evasion. There is not in the realm of public questions anything of more importance than this feature of the subject under consideration. Beneficial influences, upon the bench and the bar would result from the improvement of the personnel of the jury box. Would not the judge and the lawyer, the witness and the client, be more attentive to their conduct and

proceedings if they found in the jury box a larger representation of the intelligence, the wealth and the power in the community? Would not the bench, the lawyer, and the other participants in court proceedings be made to feel, from this class in the jury box, their open resentment of everything smacking of shyness or dilatoriness in the proceedings of the court?

In this way the questions in the discussion of which the public is arrayed, involving class and social and other strife and prejudice, would come up for consideration in the jury room when all classes were represented and the education and understanding growing out of the discussions there to be had, hand to hand and face to face, could not but help to bring about an easier solution of the refractory questions in our social, commercial and public life.

The conviction is general among lawyers that many verdicts are rendered upon considerations entirely foreign to the evidence and law of the case. It is not unlikely that many verdicts have been produced by an indisposition of jurymen to be kept out all night, sleeping upon the floor or upon benches, in order to reduce the amount of damage or punishment that may be imposed upon some individual or corporation they dislike. There are many considerations that arise from the peculiarities of cases that are submitted to jurymen which give large opportunity for influence of collateral considerations, in the way of preconceptions, biases, prejudices and matters of expediency. The verdict of the jury is general in terms, rendering it impossible to determine what considerations have produced it. In a number of the States statutes have been passed requiring jurymen in returning a general verdict to answer specific questions as to their findings on particular facts, such questions to be submitted by the court at the request of counsel for the parties, respectively. The courts have quite generally construed these statutes as leaving it discretionary with the trial court whether particular questions shall be submitted for answer by the jury. The trial courts have so uniformly exercised the discretion to refuse any such interrogatories, that attorneys have found it practically a waste of time to request the submission of special interrogatories. There is no practice that would tend more to eradicate improper considerations from the formation and rendition of verdicts than the practice of requiring jurymen to respond with answers to specific questions that may have been submitted to them. A jury that will drift away under a multitude of considerations from the merits of the case and render a general ver-

dict from considerations entirely foreign to the merits of the case, will not fail, however, to respond correctly and faithfully in answer to any specific question of fact or individual circumstance involved in the case that may be submitted to them for answer. When a general verdict is brought in with answers to specific interrogatories concerning material facts in the case, if the general verdict is found by the court to be contrary to the judgment which should be rendered upon the facts as specifically reported in answer to interrogatories, the court is then enabled to render a correct judgment in the case, even if it be in opposition to the general verdict which the jury may have returned. The objection to this practice is that it will for a number of years at least, until the practice has been reduced to a perfected system of rules, and possibly always, tend to occasion more new trials and more reversals in the supreme court. This, while a serious objection, is not determinative. The State cannot afford to allow injustice from erroneous verdicts from any consideration of mere convenience or expense.

Where honor, life, liberty or the accumulations of industry and economy are in controversy a second trial is not an undue expense, (Joseph Choate, before American Bar Association, 1898), because "justice is the great interest of man on earth." Wholesome public policy requires provision whereby every wrong, however slight, may be promptly righted and that wrongs should be righted rather than compromised or go unpunished for any reason of policy or convenience (Von Iiring's *Struggle for Law*).

An examination of the reviews of legislation published by the University of the State of New York from the year 1890 discloses that very little attention has been given to legislation concerning fundamental regulation of juries, except that in a few States within recent years a determined effort has been manifested to abolish the professional juryman by extending the time within which a juror is ineligible after having once served. Radical legislation along this line will assist in forcing upon the list the man who has escaped jury service.

An overhauling of the subject of law and administration of the jury system is too much for individual effort and is the more complicated, as discovered at the adoption of the Constitution, by reason of different practices and local conditions in each of the States, the coöperation of all of which is required for an effective reformation. The subject is fit for the uniform law commissions, established in a number of the States, and the uniform law committee of the American

Bar Association. A general committee might collect the legislation and court rules of the States and territories and foreign countries and the great volume of discussion in lay and professional periodicals, and assort and distribute the information to a large number of subcommissions having to do with subdivisions of the general question. These subcommittees, after correspondence with sources of experience in the various States and countries upon their particular subjects, could send up to a general committee a set of drafts of legislation which might by the general committee be put into a code for uniform adoption. Such an undertaking could only progress gradually and would be many years in its final accomplishment. It would meanwhile be greatly assisted by, and would greatly assist, any individual effort, in the various States, in the correction of particular abuses.

## PROPOSED REFORMS IN CRIMINAL PROCEDURE

BY JUSTICE HORACE E. DEEMER

*Supreme Court of Iowa*

Love of abstract justice is common to mankind in general and to all systems of law. But there are certain characteristics of what is known as the common law which differentiate it from all other systems. In its certainty, its fixity, its conservatism, which distrusts change and values precedent, it possesses qualities unknown even to the Mussulman with his interpretations of the *Koran*. There are two old maxims which clearly illustrate this thought. One reads "It is better that the law be certain, than that the law should be just." And another: "An ounce of precedent is worth a pound of principle." The legal ideas, methods and practices which prevail upon the European continent and in Spanish America are entirely different from those which obtain in England, the United States, and wherever the common law system is in force. It would be interesting to note the causes which led to the establishment of the two systems which may rightly be called the common law and the civil law; but even if time permitted this would be beside my purpose and I need only say that primarily perhaps it may be truthfully asserted that they are racial or temperamental. Much, of course, is due to environment in the formation of any social institution; but more doubtless to type of mind and the development of ideals. The chief feature of our common law system is, I think, its regard for the individual rights of man. It is nowhere denied that ideal liberty prevails only in those countries where the common law system obtains; and it is even more significant that this freedom has never consciously stood for license, but for liberty in its true sense. Under this system a man may do as he will save as his conduct interferes with the rights and privileges of others. When this occurs he must subordinate his will to the public good. He is not only to obey, but also to prevent others from disobeying. This is the "liberty under law," which safeguards our system; liberty, the child of the common law which today holds together the most advanced civilization of our times.

Our forebears were self-assertive, although not lacking in self-control and in respect for authority. In this they differed essentially from the Slavs on their east and the Celts on the west. Moreover, they were intensely practical, somewhat phlegmatic and ideally realistic. They were not given to theorizing or to experimentation. Their pugnacity, their respect for authority, their self-control, their conservatism, and their practicability made their institutions what they are, and secured a product very different from that which grew upon the soils of Italy, Spain or France. So much for the genesis of the system which we are to discuss for a few moments this evening. One other premise may be taken before going deeper into the subject. Our thought so far may have been of substantive law, forgetting that the remedial grew up with the substantive and that inseparably bound up with rights of persons and rights of things are modes of procedure and forms of action. Those tendencies of our ancestors which gave substance to our law, very markedly affected the forms—the procedure whereby rights and duties are made effective. In the early stages of procedure there was great respect for forms and precise verbal expression was for various reasons insisted upon; but with the afflux of time these rules were modified and absolute precision was not required or exacted, liberal provision being made for amendment. Growth in this respect has always been evolutionary and not revolutionary. The contests between the king and the allied forces of barons and churchmen, and landholders or middle classmen brought us Magna Charter, and preserved, if it did not secure, the jury system. Criminal procedure was exceedingly technical, due no doubt to this selfsame contest; and the tenacity with which men clung to their individual rights. Our ancestors had so much respect for forms of law that they thought it better for a guilty man to escape than that technicalities should be disregarded. Modifications in criminal procedure have almost universally, especially until recent years, been in favor of the accused rather than to secure that certainty of punishment which should be the end of any penal system. There is a growing sentiment, not only among laymen but with lawyers as well, that our criminal procedure is overloaded with technicality and is on the point of breaking down. That there should be some reform in our system of criminal procedure is everywhere conceded; but for one I am not ready to exchange our own for continental methods. I do not believe we are ready to resort to that torture, that bullying of prisoner and witnesses and that overweening desire for conviction

which prevailed, for instance, in the Dreyfus case in France. Whilst I am willing to concede that the pendulum has swung too far in this country in favor of the individual charged with crime, it is quite certain, I think, that we shall not in our quest for reform revolutionize our entire system and adopt another developed by another race and in a different atmosphere. The most insistent reformer will hardly demand the adoption of continental methods. But it must be conceded that too many criminals are escaping punishment under our present rules and that something must be done to secure more speedy trials and greater certainty of conviction. Some one has said that the present situation is due to sentimentality and technicality, sentimentality on the part of the whole people, and technicality on the part of the lawyers and courts. I quite agree with Mr. Andrew D. White that there is a "slimy, mushy and gushy sentimentality for criminals," which finds expression in the jury box and that there are fewer convictions for crime proportionately in this than in any other country. Too often this sympathy is for the criminal, with no compassion even for the real sufferers although they be a widow and orphaned children. He said that he had no sympathy with the criminal, but for those who as a result will be murdered, their families, and their children. His final conclusion was that "our sham humanitarianism has become a stench" and that "the cry now is for righteousness." It is easy to lay the blame for the lax administration of our criminal laws upon the people who either carry their sympathies into the jury box or are unconsciously perhaps governed thereby in arriving at their verdicts. Indeed this sickly sentimentality which crops out in the public prints, manifests itself in public prisons and is used most effectually by lawyers in the trial of cases, has had very much to do with the breakdown, if such there be, in the administration of our criminal law. Reformation in this depends upon the growth of a public opinion which will substitute sober sense for emotional sentimentality in the jury box. While there must be a decided reform of all the people if we are to secure needful results it does not follow that the law itself is not at fault and that no reforms are needed in court procedure. Neither lawyers nor judges should be content to say: "I am not wholly to blame. The people are as much if not more responsible than I for existing conditions." For one I am ready to abandon the old maxim that it is better that ninety-nine guilty men should escape than that one innocent one should suffer. In civil procedure it sometimes happens that individuals must suffer

in particular instances rather than to change a fundamental and well established rule for the government of all. And so in criminal procedure it is better that a few should suffer rather than that the many should escape. Nothing can be more destructive of good order than a widespread disregard or a feeling of disrespect for the processes and results of criminal law. If public justice is swift and true the individual is content but if long delayed and uncertain he becomes restive, prone to take the law into his own hands and to resort to lynch law. Between Continental and Anglo-Saxon methods there must be a golden mean which it is our duty to discover and apply; some system which will preserve the interests of society by punishing crime, and at the same time safeguard the individual against unjust conviction. I believe that in our zeal for liberty and the security of individual rights we have gone too far and in large degree forgotten or ignored the rights of society as against the individual. As Shakespeare puts it "liberty plucks justice by the nose and quite athwart go all decorum." The chief difficulty before us lies in the fact that most of these so-called guarantees of individual rights are embedded in constitutional provisions which cannot be changed save by the laborious and uncertain processes of amendment. One of our ablest law writers recently said:

Respect for the Constitution is one thing and respect for substantial fairness of procedure is commendable; but the exaltation of technicalities merely because they are raised on behalf of an accused person is a different and very reprehensible thing. There seems to be a constant neglect of the pitiful cause of the injured victim and the solid claims of law and order.

Another has said:

We have long since passed the period when it is possible to punish an innocent man; we are now struggling with the problem whether it is any longer possible to punish the guilty.

Constitutional limitations in general are, that no man shall be deprived of his life or liberty without due process of law; that he shall not be convicted save by a jury of his peers; that he shall be informed of the accusation against him, be confronted by the witnesses and not be compelled to testify against himself; that he shall not be subject to unreasonable searches and not be twice put in jeopardy for the same offense and that no person shall be held to answer for any serious offense unless on presentment or indictment

by a grand jury. In securing these to the individual, legislatures and the courts have established such technical rules of procedure that the result has been a practical break down of our criminal jurisprudence. That we may closely study some of the proposed reforms it is well to consider in a brief way the ordinary and orderly course of procedure in criminal cases. First we have the court presided over by a judge, and with necessary officials; the sheriff, and the prosecuting attorney. And as an integral part of the court in most States, a grand jury. Then we have a committing magistrate; sometimes a justice of the peace and sometimes a coroner. A prosecution is instituted by a preliminary accusation or information before the committing magistrate, or by presentment and indictment of a grand jury. I am omitting for the present those minor crimes generally called misdemeanors which are tried before some inferior court or tribunal. The purpose of the preliminary examination is to determine whether or not a crime has been committed and if there be a probability that the person accused is the one guilty thereof. That being found affirmatively the accused is held to the grand jury. The proceedings of the grand jury are secret which fact is really an anomaly in our system of jurisprudence. Bentham most seriously objected to this secret inquisition as illogical; and in contrasting the two juries known to English law as grand and petit said, of procedure before the trial jury a characteristic and indispensable property is publicity; of the procedure before the grand jury a property still more characteristic is secrecy. After indictment comes the arrest, the arraignment, the plea and if there be no continuances, the trial before a petit jury with aid of counsel secured or guaranteed; and if there be a conviction an almost unlimited right of appeal from every question both of law and fact arising upon the trial. In some jurisdictions the State may also appeal for the purpose of settling moot questions of law. In the event of a reversal the verdict and judgment of the lower court does not bind the defendant; but in many jurisdictions it is conclusive upon the State. That is to say if one is accused of murder and found guilty of manslaughter and upon appeal the judgment is reversed and a new trial awarded, the defendant cannot be again put upon trial for any higher decree of crime than manslaughter. If the judgment is affirmed by the State court there is still a right in the defendant to petition for a rehearing; and in certain cases a further right of appeal to the supreme court of the United States with the right in that court also for a rehearing. Surely with all this complicated machin-

ery there is little fear that an innocent man will be convicted and as a matter of fact the entire plan is in the interest of the individual charged with crime. In the limited time at my command I cannot delve into the musty pages of the past to find the genesis of these various proceedings; nor can I do more than call attention to some of the more serious defects therein. The court which administers the criminal law is undoubtedly properly organized. That is to say there must be a presiding genius,—a prosecuting officer and a sheriff or other executive officer. But in the administration of the law it has seemed to me that the state's attorney should be charged with greater responsibility in order that he may be held accountable for the proper and orderly administration of justice. He should not be so situated as to be able to shift the blame for inaction upon the grand jury or any other tribunal. The trial judge should have larger powers than are now granted. He should be something more than a mere moderator. He should have more power in the selection of a jury, exercise greater authority over counsel, and have the undoubted right to prohibit the stage settings and trumpery which ingenious counsel use to attract and secure the compassion and sympathy of a jury. Our criminal trials have become altogether too sensational and instead of being conducted sanely and soberly they are in many communities regarded as a species of entertainment for the groundlings. Were an admission fee charged they would rank well with the melodrama or the vaudeville. After much hesitation and reflection I have concluded that a grand jury which possesses no inquisitorial powers should be entirely abolished; and where given such powers, should be summoned only by the court upon its own motion or upon the request of the state's attorney: never at the request of a defendant. In place of the grand jury the committing magistrate should be substituted, who would give to every one a public hearing; and if there be probable cause for holding one accused it should be the duty of the prosecuting officer to file an information or indictment in the trial court against the person held to answer to that court and not to a grand jury. There seems to be no good reason why within proper limits this information or indictment, call it what you will, should not be amenable to the same extent as a pleading in a civil case with the right of a defendant to a continuance in case of bona fide surprise. This system would fasten responsibility where it properly belongs, safeguard a defendant against malicious and unfounded prosecution because the proceedings against him would be public and not behind closed doors, and save

many miscarriages of justice because of some technical or trifling defect in the indictment. A grand jury with inquisitional powers might be called to assist in ferreting out crime whenever in the judgment of the court there was need for such assistance, and might regularly be empanelled say once a year for this purpose. The only reason for preserving this archaic relic is to assist the prosecutor in the discovery of crimes and criminals. It is not longer needed as a protection against arbitrary power and authority, for here the people themselves are the ruling power; and against themselves they need nothing but regular and orderly procedure. The history of this body shows conclusively that it has outlived its usefulness. Following the information or indictment comes the arraignment and plea. The former is in no sense necessary when the defendant is furnished with a copy of the charge as he is in most jurisdictions. There is necessity for a plea, for a defendant may wish to admit his guilt; but there is neither sense nor logic in the proposition that a case duly tried by a jury under proper instructions from the court, should be reversed because of failure to arraign or for want of a plea by the defendant. If he does not admit his guilt he must be tried and if tried he is denying the commission of the crime charged. An opportunity to plead should, of course, be given, but a defendant duly tried as upon a plea of not guilty should not be heard to complain upon appeal of failure of the record to show a plea. With the case at issue by plea or failure to admit guilt it should be speedily tried. As a matter of fact few cases are tried until the patience of both court and counsel is exhausted, and so much perjury has been committed as to be shocking to both court and counsel. Of course, a defendant should for good cause have the right to a continuance; but to prevent perjury and fraud the right to cross examine all affiants for the continuance including the defendant himself should exist, and the State should be permitted to meet the showing by counter affidavits. The method of selecting a jury should also be radically changed. Either the court itself should conduct the examination of jurors, or it should have more power in controlling counsel with respect thereto. It was never the design of the law to secure either ignorant or incompetent persons upon a trial jury. The preconceived opinion of a juror should not constitute a disqualification unless fixed and unqualified. There never was at any time any excuse for giving defendant an advantage over the State in the matter of peremptory challenges and yet in some States he is given two to the government's one. Someone

has said that if there be cause for excusing a juror he should be excluded for that cause and not otherwise. Although not ready to endorse this statement I believe that in no event should a defendant be given the right to exclude more than five jurors without assigning a cause which the law deems sufficient. It is all important to secure jurors who on the one hand shall be impressed with the duty of punishing crime for the interests of society at large and on the other with the thought that individual rights be respected and no innocent man made to suffer. This calls for men of intelligence and sound judgment, men who are not easily influenced by sympathy, governed by prejudice, or susceptible to unworthy motives. More care should be taken in the selection of jurors, and courts should be reluctant to excuse those who are best qualified to serve. Rules of evidence which obtain in law courts have been woven upon the loom of time. They obtain in order that those not experienced in hearing cases may not be misled and deceived as to the real issues to be tried. And in no other respect is there such a marked distinction between common and civil law proceedings as with reference to rules of evidence. All remember how hearsay evidence was received without limitation in the Dreyfus case and how distinguished generals were permitted to place their hands over their hearts and give their opinions that Dreyfus was guilty although having no personal knowledge whatever upon the subject. A change to the French system would not be tolerated, nor should it be. No one should be permitted to give his conclusions as to the guilt or innocence of another; nor should he be permitted to testify to mere gossip or as to what he heard others say. In some respects, however, there might be a beneficial change with reference to the introduction of testimony. Originally a defendant could not give testimony on his own behalf. This rule has generally been abrogated and in most jurisdictions he may be a witness on his own behalf; although he cannot be called by the State and forced to give incriminating answers. It is optional with him to go upon the witness stand. He may also take the depositions of absent witnesses to be used on his own behalf, but the State cannot do this. Under constitutional provisions a defendant is entitled to be confronted by the witnesses against him; and generally counsel are forbidden to make a reference to the defendant's failure to testify on his own behalf. One of the reforms which I propose is that the State be given the right to take depositions and to use them against one accused of crime under the same circumstances and conditions as authorize a defendant to use

them. Very many acquittals are due to the fact that the defendant by fair means or foul induces witnesses to depart from the jurisdiction of the court so that their testimony may not be had. And for various reasons witnesses against a defendant may not be able to attend court. If defendant be given the right to cross examine an absent witness in person or by counsel whenever his deposition is taken there can be no valid objection to the use of testimony in that form. As a defendant now has the right to take the stand in his own behalf and to explain away incriminating circumstances it seems to me the height of folly to prohibit counsel from making reference to such fact. The truth is what is sought in all cases both civil and criminal and if a man having knowledge of all the facts fails to explain the circumstances produced against him surely, it is logical to say that there is no explanation which he can offer. I do not agree with those who would make a criminal testify against himself, or to any change which would permit any form of torture to secure a confession, or to a grant to the State of the right to make unreasonable searches or seizures. These guarantees are fundamental and should be preserved. Nor would I change the rule as to reasonable doubt, save where as in some jurisdictions the presumption of innocence is made to take the place of positive or substantive proof. This latter rule is illogical and decidedly unjust to the State. Enough of a burden is imposed upon it when the presumption is made to stand simply as a shield protecting the defendant from conviction, unless the State proves his guilt beyond a reasonable doubt. It should not be made a sword nor be given the effect of substantive testimony on defendant's behalf. The trial jury is an essential part of our system of jurisprudence and should not be tampered with save in the direction of securing better jurors. In criminal cases majority verdicts are not, as I view it, permissible. The trial judge should have or exercise more authority over counsel in the trial of a case. Badgering and "bully-agging" of witnesses should be promptly stopped and counsel should at all times be confined to a dignified and orderly course. So long as jurors are judges of the facts the trial court should not hazard an opinion regarding the guilt of one accused of crime save where the State has failed to make out a case. If a jury is not competent to determine fact questions it should be abolished; if competent the trial judge should not usurp its functions. If properly instructed a jury of twelve men is as competent to decide questions of fact as the most learned judge. Coming now to the all important and much discussed question of

criminal appeals we find widely divergent views and a great clamor upon one side of the Atlantic, where until recently no appeals were allowed, which resulted last year in the establishment of a criminal court of appeals; and on the other side of the water urgent propositions from jurists, publicists and statesmen for the practical abolition of appeals in all criminal cases. In view of this sharp conflict of opinion it is manifest that there must as usual be a middle view which will finally prevail. The results in the Maybrick, Edalji and other like cases in England brought about the establishment last year of a court of review for criminal cases; and the number of reversals in criminal cases in this country upon technical grounds has led to a most searching inquiry as to how these results may be avoided. So much has been written upon these matters that it is useless to attempt a review of the legislation, actual and proposed, to cure the evils. Neither the profession nor the people are ready as yet to abolish appeals in all criminal cases. Nor is this regarded as essential to a proper scheme of reform. There should, however, be some limitation upon this privilege and some changes in the rules almost universally applied to cases on appeal. Primarily no appeal should in my opinion be allowed from judgments rendered in criminal cases of which a magistrate or inferior tribunal has original jurisdiction. There must be an end to litigation somewhere and the judgment in these trivial misdemeanor cases should be final where rendered save upon some question of law reserved by the trial judge and certified to the court of appeals as a matter of public importance. And in such cases either the State or the defendant should have the right to raise the question and have it decided by the higher tribunal. The question so reserved should always be one of substantive as distinguished from adjective or remedial law. Right of appeal should exist in all the more serious cases. But from the appellate court should be taken the power of reviewing the testimony. The only question of fact which should be left to the court of appeals is this, Does the evidence upon the part of the State make out a *prima facie* case? That answered in the affirmative should end all inquiry as to the facts save where defendant has been denied the right of introducing relevant and material evidence on his own behalf. If he be deprived of such right then unless the testimony be cumulative a new trial should be awarded no matter what the reviewing court may think of the verdict returned. Any other rule in effect deprives one accused of crime of a jury trial. If the appellate court be the final

arbiter in such cases then the question of guilt or innocence should be determined by a judge and not by a jury and the whole jury system should go as a relic of barbarism. If immaterial, irrelevant, or incompetent testimony be admitted on behalf of the State then there should be no presumption of prejudice on account thereof, and there should be no reversal unless the appellate court finds that such testimony was prejudicial to the accused. It is illogical to say that testimony which has no relevancy or materiality because too remote or of no logical bearing upon the issues is presumptively prejudicial. Such a postulate is based upon the assumption that minds capable of weighing and measuring facts and circumstances are just as likely to give effect to matters having no logical bearing or sequence as to material and relevant testimony. Incompetent testimony, otherwise material and relevant but inadmissible because of some arbitrary rule, should not for that reason alone be regarded as prejudicial. If informations be substituted for formal indictments by a grand jury, with liberal right of amendment, we shall have no more of those shocking cases based upon some trifling and technical defect of pleading which are common to most appellate courts. In my opinion there should also be a limit in every case upon the right of appeal. The questions should either be certified or reserved by the court trying the case or something in the nature of a writ of error should be allowed by the appellate tribunal or some of the judges thereof. This would preserve to a defendant all of his rights and at the same time put an effectual quietus upon frivolous appeals. No bail should be allowed unless and until the questions were reserved or a writ of error granted. The time for appeal should also be limited to three months from the time the judgment is rendered by the trial court. No good reason appears for giving defendant, six, nine or twelve months to determine whether or not he will take an appeal. Coming now to cause for reversal upon appeal it must be assumed that jurors may be trusted; if not, our whole system is wrong. With this assumption it must be granted that there are some errors which the jury itself may correct. As to these there should be no reversal. If the errors are not of this class then of course the court must make the correction. Allusion has already been made to those which the jury may correct. As to mistakes of substantive law made by the trial court, assuming that the case comes to the superior tribunal upon a writ of error or question reserved, there should be no reversal, as it seems to me, unless the court is able to say after reviewing all the evidence that the jury was

probably not possibly misled thereby. Juries are not usually influenced by technical errors of the court. They view the entire field and do not convict unless they are satisfied of moral as well as legal guilt. They do not closely scan the instructions, note the punctuation of sentences, or closely analyze the phrases used. They generally listen to the charge as read and without careful analysis reach their conclusions upon the whole case. Counsel may be depended upon to emphasize the important and controlling issues and facts, and unless there be glaring misdirection upon the part of the court, no harm usually results. Some of the reforms here proposed must be worked out through the laborious processes of constitutional amendment; but many of them may be secured immediately through legislative enactment and still others by judicial construction or reconstruction. The one demanding first consideration relates to appellate procedure. The almost universal rule which obtains in all courts of review is that where error is found, no matter how trifling, prejudice to defendant is presumed. Since the judicature acts of 1873, the law of England has been that,

A new trial shall not be granted on the ground of mis-direction of the jury or of the improper admission or rejection of evidence unless in the opinion of the court to which the application is made some substantial wrong or miscarriage of justice has been thereby occasioned on the trial.

A learned judge of an American court once said with respect to this that,

The English have had the good sense to keep the right of trial by jury on earth as an instrument for doing justice between man and man here in this world; whereas we in America have worked it up into the thin air of presumption and metaphysics.

Prior to the passage of the acts of parliament something over *thirty* years ago, England was suffering as badly as we from excessive technicality and her procedure was dilatory, expensive and unsatisfactory. Since that time her system has been simple, colloquial, flexible, prompt, free from technicality, and thoroughly in touch with the spirit of the times and of everyday life. Shall we in America be more conservative than the mother country, shall we simply out of veneration for the past retain our cumbersome, burdensome, over-technical and refined system of legal procedure? The extreme technicalities of our law grew up at a time when people were wresting their liberties and their rights

from king and lord and baron; when more than two hundred crimes were punishable by death; when the individual man was fighting for freedom, and when technicality was the only shield from horrible and revolting punishment for the most trivial of offenses. As said by another:

While we did not adopt the barbarous penal statutes of the old country, we did adopt a mass of technical rules of law which were invented by humane judges to avoid the necessity of imposing barbarous punishments; we have not adopted the barbarous punishment and we should not have adopted the humane technicalities which those punishments alone excused or justified. The present trouble in our criminal law lies not only in what we have created; but largely in what we have thus adopted. The humanity which by those technicalities made justice in spite of law a century ago in England makes law in spite of justice in America today.

This is but a restatement of that old aphorism: "Defects are but virtues carried to an excess." There being no excuse for over-refinement and technicality in the administration of our criminal laws, both the State and national government should hasten to enact statutes to the effect that a criminal case should not be reversed upon appeal, unless the record as a whole shows a substantial error plainly prejudicial to defendant's rights and a substantial miscarriage of justice on the real merits of the case. The English statute might well be re-enacted in this country. Under such a statute many interlocutory rulings made during the progress of a trial will be treated as discretionary, and technical and nonconsequential errors will be disregarded. Reversals will not follow from error as a matter of course but only when prejudice is affirmatively found. We can well trust to the conservatism of courts as an efficient shield to the innocent, and at the same time secure society against those things which threaten the stability of our institutions. Frequently have we listened to that well known phrase: "Let justice be tempered with mercy," and it has often been so used as to thwart justice itself. First let us have justice and then mercy. Penologists have demonstrated that it is not the severity of punishment which acts as a deterrent from crime. Certainty and celerity of the processes of the law are really the greatest discouragement to the criminal classes. When the offender has been brought to bar for his wrong to society, then may society justly show mercy, then should it begin an investigation as to its own responsibility for the conditions which brought about that wrong, and then should it undertake the solution of the problem of how to

treat the culprit. Punishment should be made to fit the criminal and not the crime; and he whose liberty is a menace to society should be restrained just so long as it is unsafe to the community for him to be given his freedom. Determinate sentences have been a dismal failure and the time has arrived for that sort of punishment which commends itself to a humane, intelligent and responsible people. Practically all of the leading penologists of this country now favor the indeterminate sentence as the only reasonable and entirely just method of punishment; and the scheme is worthy of the best thought of all associations having at heart the interests of our common humanity. By nature and by training I am a conservative and not, I think, an iconoclast; but I have been so impressed during the last few years with the growing disrespect for law, the repeated lynchings common to every latitude, the many times farcical proceedings of courts of justice in the trial of criminals, the successful appeals of lawyers to the passions and sympathies of men, the callous disregard by jurors of the obligations of an oath, and the extreme technicality of appellate courts, as to institute a search for some sane reforms which will save our present system from the just criticisms which have been lodged against it, and in the end, from a disastrous revolution which may lead us as far away, perhaps, from that just mean between social and individual rights in the supposed interest of the entire body of the people, as we have heretofore traveled in our desire to protect and secure individual rights. Distributive justice which gives to every man his exact deserts should be the end and aim of all criminal procedure.

## LEGAL OBSTACLES TO THE REFORMATION OF PRISONERS

BY SAMUEL J. BARROWS

*President of the International Prison Commission*

The question whether prisoners can be reformed is no longer an open one. It is as capable of scientific demonstration as that coal tar, the refuse of the gas works, can be made into saccharin or aniline dyes; that good white paper can be made from unclean rags, and that flowers can be raised from ungainly weeds. The question I have to consider is not the question "Can we reform offenders who come under legal restraint," but why do we not reform more? One element in the answer may be the character of the prisoner, another the character of the men under whom he is placed, but a third and potential element lies in the defects of our whole legal system. The fact is that a vast number of men who come under the grasp of the law are not reformed because nothing is done to reform them. If you are going to turn rags into paper it is not merely a question of having a good machine at the paper mill and good operators; but you must see that the rags go to the mill and not to the dump.

An engineer was called upon to study the defective water supply of a large city. He found that for years an eight-inch pipe had been diverting water into the sewer which ought to have been filtered and gone into the reservoir. It is so under our legal system. There are streams of life which ought to be filtered and which might be converted, turbulent streams though they are, into light and heat, and power, but which go off into the sewage.

What are some of the defects of our penal codes? A fundamental defect is that they are legal not ethical. They embody certain antique ideas partly metaphysical and partly theological of retributive justice. It is easy to trace their genesis to ancient society, easy to see how ideas of individual vengeance were embodied in a system of social retribution. Our codes are essentially punitive and the experience of centuries has shown that a system that is essentially punitive is not corrective. The legal tradition that to every offense there must be measured out a certain weight of penalty is simply a

modern application of crude ideas of primitive justice. If these codes were effectively deterrent their existence might be justified as a means of preventing crime; but experience shows that they are only in a small degree deterrent.

Our codes do not represent any fixed or uniform standard of justice or morality. Thus according to comparisons made fifteen years ago by Dr. F. H. Wines, the maximum penalty for perjury in New Hampshire, Kentucky, and Connecticut was five years. In Maine, Mississippi and Iowa it was imprisonment for life. In Delaware it was punishable by a fine without imprisonment from \$500 to \$2000. The maximum penalty in Virginia for incest was six months' imprisonment; in Louisiana, imprisonment for life; in Delaware, a fine of \$100. In the States which impose life imprisonment for these offenses the idea of reformation is not included; it is simply the question of getting the man out of society. In Delaware, on the other hand, it is hard to see any reformatory element in the imposition of a fine of \$100, which for a man with a good bank account simply amounts to a license to commit the offense. Nor does the five year penalty imposed in other States necessarily represent any reformatory principle. It depends upon what is done with the man during his confinement. He may come out better or worse. He is very likely to come out in the frame of mind of a prisoner who stole a large sum of money which he hid away in a safe place. After five years of imprisonment he asked the advice of the warden a few days before his discharge as to how he should invest his stolen money. His argument was that he had paid his debt to the State by serving five years and that therefore the money belonged to him. His position may not have been ethical, but it was logical.

Another legal obstacle to the reformation of prisoners is the curious distinction made in the classification of offenses. They are legal, not moral. They are based not upon character, but upon circumstance. Thus in determining in the State of New York whether a certain act of theft is a felony or a misdemeanor, three circumstances, time, place and value are taken into consideration. The boundary line of value is placed at \$25; the boundary line of time between day and night, which varies with the seasons; and the question of place, whether it be a house or a railroad car, assumes importance. Now these distinctions have not the slightest ethical value. The thief who steals \$24 may be worse than the one who takes \$26. And the thief who steals from his employer's drawer at 3 o'clock in the

afternoon may be as bad as he who takes the same amount at 8 o'clock in the evening. These legal distinctions so trivial in themselves assume great importance because of the consequences attached to them. A felony is an offense for which a man may be sent to a State institution, and a misdemeanor is an offense for which he may be sent to a county institution. In the State institution as a felon he may be brought under reformatory influences. In the county jail as a misdeemeanant he is brought under influences which not only do not make him better but tend to make him worse. In New York State we have been handicapped in our reformatory work for many years by this legal distinction. The Elmira reformatory was established only for felons, that is for the young man who steals \$26 and not for him who steals \$24; for the young man who has pilfered after dark and not in the daylight. Ten thousand young men every year lie neglected in the jails and county penitentiaries in the State of New York because there is no power under the law to sentence them to the State reformatories. In some States the distinction, I am glad to say, is not applied, nor does it apply to women in the State of New York.

Another legal obstacle to the reformation of the offender is the legal habit and tradition from which we are only beginning to free ourselves, of considering each offense as a distinct, separate act to which is attached a separate penalty. As has been well said, the code is fitted to the crime, instead of to the criminal. This defect of the code appears in its worst form in the short sentence. A petty thief steals a small sum of money; he is sent to jail for three months; in a short time he repeats the offense and is sentenced for the same term. He goes on repeating his thievery. He comes before different judges but he goes back and forth to the same institution. There are men in prison who have been there ten, twenty, thirty times. A young man twenty-six years of age, still young enough to be within the reformatory age, was sentenced twenty-six times to the county jail and workhouse, but never long enough at any one time or at any one place to effect any change in his habits. Provide the best reformatory in the world; equip it with the best apparatus; let it be manned with the very best corps of officers and instructors and it will be totally ineffective if prisoners are committed to it for terms ranging only from ten days to three months.

The short sentence is seen at its very worst in our legal treatment of drunkenness. In Chicago a man was committed for drunkenness

300 times; in Scotland, a woman 333 times. Yet the judge who imposed the sentence for the 333d time paid no attention to the fact that the offender had committed the same offense 332 times before. The legal treatment of drunkenness practically ignores all physiological considerations. It treats the prisoner as an abstraction, not as a human being. It punishes the offense while ignoring the offender.

Modern studies of the criminal and of the forces of heredity and environment which go to produce him, as well as the forces of education which influence and change his character, have led to some modifications in our laws providing that previous convictions, and the character of the offender should help to determine the disposition that is to be made of him. We have so far modified our judicial system as not to punish for criminal acts offenders who are decided by confident experts to be imbecile or insane; we are taking out of the catalogue of criminality children under sixteen years of age and subjecting them to a procedure which is educational rather than penal. These are welcome indications that instead of merely concentrating the attention upon the act, we are coming to study the actor. It is quite possible that physiology and psychology will be of the greatest importance in the future in helping a court to determine not merely under the rules of evidence whether an accused person committed a certain act, but whether he is a fit person to be at large in society and whether he should not be submitted to processes which shall profoundly influence and perhaps renovate his character; or if he is an habitual and hopeless offender, be committed permanently to prison or to a farm colony so that society may be protected against his release.

I have spoken of the outflow, the wastage, the flow into the sewage; but this is not all. The great menace to society is that there is a constant backflow from the social sewage. Thousands of criminals are let loose in society who are no better, but somewhat worse, than when they were committed to those pools of moral contagion, the county jails. They pollute anew the sources of our social life; they breed a new crop of criminals. The short sentence and the county jail together are responsible for much of this distribution and infection. Nothing too severe can be said about the county jail system. It is not merely a question of washing them out, cleaning them from vermin, and putting windows into the dark rooms; the prison architect and the prison physician alone cannot remedy the matter. The system is supported by legal distinctions which are fundamentally wrong.

One of these legal distinctions is purely geographical. A State is divided into a certain number of districts called counties. While the criminal code is made to cover the whole State, the judicial and penal system is affected by county divisions. Thus in many States the county court sentences the misdemeanant to the county institution. There is no State control over these county institutions, no uniformity in structure, discipline or régime. Crime is treated as a social matter. It is impossible, however, to deal effectively with it on county lines. Take the 15,000 young men in the State of New York who might be good subjects for reformatory treatment. It is impossible for every county to have an independent reformatory. It is extravagant and unnecessary. It is impossible to classify prisoners properly in the smaller counties. The only remedy for the utter failure of the county system is to establish State control for all offenders who have violated State laws. The difference in stigma between a State prisoner and a county prisoner should disappear. It has no deterrent or reformatory value. A few district prisons or reformatories in different parts of the State will accommodate all sentenced prisoners. The county jails properly remodeled should be reserved only as houses of detention for those awaiting trial.

One of the worst features of the county system and one which constitutes a great obstacle to the reformation of prisoners is the fee system: the practice of paying sheriffs so much a head for every prisoner admitted and discharged, and so much per day for the board of every prisoner committed. This system is a relic of the system which prevailed in England when John Howard began his work more than a century ago and strange to say it still exists in most of the States in the Union. It furnishes a motive to the sheriff for having as many men in jail as possible and keeping them there as long as possible. Investigations in thirty counties in New York which have abolished the fee system and substituted a salary for the sheriff show a reduction in prison population and in expenses of from 10 to 50 per cent. The whole fee system is fraught with scandal and corruption. A few weeks ago I discovered in the jail of Queens county, New York, which is still under the fee system, that 840 young men between the ages of sixteen and thirty, all of whom should have gone to reformatories, had been committed to this county jail not for the benefit of the prisoner, but for the benefit of the sheriff.

It is a serious indictment of our present penal system that it commits many thousands of offenders to prison who without any danger

to society can be better dealt with without imprisonment. The probation system, applied not only to children but to adults without limit of age, is now firmly rooted in half a dozen of our States, and under the form of suspension of sentence has been established in France and Belgium for almost twenty years. In Massachusetts the number of those placed on probation has gradually risen from a few hundred to nearly ten thousand. In France it has risen year by year until it has reached 39,000. This system on its introduction had to meet the opposition of conservative jurists who treated it as a device for allowing men to go unpunished, the infliction of punishment being regarded by them as the main object of the criminal court. The idea that the court might be an essential part of a salvage system designed to protect society through the reformation of the prisoner, was wholly contrary to the legal tradition. In New York and Massachusetts judges have now become thoroughly converted to probation as a means of social protection as well as of individual reformation.

For those offenders who require, as a large number always will, a change of environment and commitment to some institution, the most far reaching and indispensable reform in our legal system is the adoption of the indeterminate sentence in connection with a reformatory system. The law governing commitment to Elmira reformatory provides that the courts imposing sentence to that institution "*shall not fix or limit the duration thereof.*" In a single line the power of the judge to fix any time sentence is removed. The maximum limit of time is that fixed in the code. That is sufficiently arbitrary, but it is vastly better than when left to the discretion of the judge. Before long we ought to have an absolute indeterminate sentence. The three important elements in it are first that the court committing shall not fix the duration; secondly, that the institution to which the prisoner is committed shall be reformatory in its character and equipped with a marking and grading system so that the prisoner by his conduct and character shall fix the length of his own sentence. Thirdly, the release of the prisoner should be a conditional release determined by a court of release or board of parole. Of all proposed modifications of our penal system none would effect such a radical and beneficent change as the general adoption of the indeterminate sentence with all that it implies.

## LEGAL REPRESSION OF POLITICAL CORRUPTION

By MR. FRANCIS E. McGOVERN  
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Of the entire field of crime involving political corruption only a remote corner, that of its legal repression, has been assigned to me for discussion here. For this reason, before entering upon the consideration of my theme, it will be serviceable, I believe, briefly to state the nature of the thing sought to be suppressed.

Political corruption is not simply dishonesty in the public service; neither is it merely a phase of crime in general, nor even of crime committed by those who hold public office. The dishonest and the criminally inclined, like the poor, we shall have with us always. Political corruption, however, is a transient phenomenon, especially characteristic, so far as this country is concerned, of the last ten years. Like financial crises and periods of business depression it has come and gone quite independently of the moral factors constituting common honesty or ordinary respect for law. Its advent in any community is marked by the commission of bribery, extortion and criminal conspiracies to defraud the public, without a corresponding increase in other and unrelated crimes. Its going, likewise, is accompanied by no abatement in the usual grist of larcenies, burglaries and murder. It is, indeed, a unique and highly complex thing; an institution, if you please, rather than a condition of society or a temper or tendency of any class of individuals.

Not merely dishonesty, therefore, not merely crime, but dishonesty and crime systemized, reduced to a science, practiced not as an occasional offense, but as a daily occupation by men in office and others out of office who have banded together to enrich themselves by debauching their government and corrupting its servants;—this is the central, striking, characteristic feature of political corruption. It is not a case of a bribe given or taken today and another next week, with no connection between the two offenses; it is bribery organized into a profession and followed as a steady means of livelihood. Everywhere, whether in Harrisburg or San Francisco, in St. Louis or Milwau-

kee, the procedure is the same. Only the size of the bribe fund varies. The methods employed are everywhere alike. Upon the inside a ring of public officials who compose a majority of the common council, county board or State legislature, as the case may be, and upon the outside a band of corrupt capitalists and business men, and dominant over all a political boss assisted by flying squads of trained and experienced lobbyists drilled in the business of collecting corruption funds from the bribe-givers and distributing them among the bribe-takers who compose the ring.

As no single cause has called this institution into existence, so no remedy alone will completely eradicate it. Education, moral suasion, enlightened political action directed against it—all these and others are effective cures within certain limitations. But without legal repression to break the ground and pave the way for them these remedies have nowhere proved successful. General denunciation of graft is safe, but ordinarily quite ineffectual. Specific denunciation of political corruption is never safe unless it be either accompanied or preceded by successful prosecution of the individual denounced. Besides, scolding never pays, never reforms; while even to the dullest mind prison stripes inculcate the appropriate moral lesson.

In the work of putting corruptionists behind prison bars the first and most indispensable requirement is an honest grand jury. Without the assistance of such an agency political corruption has nowhere been successfully exposed. Whether in St. Louis, Minneapolis, Milwaukee, Grand Rapids, Green Bay, Boston, Buffalo, Pittsburg, Harrisburg or San Francisco, the story is everywhere the same. Whatever in this respect has been done anywhere, the grand jury has accomplished.

Nor is the reason why this should be so difficult to perceive. Wherever criminal actions may be begun by the filing of informations as well as by indictments, as is the rule now in many States, the prosecution of ordinary crimes does not require the intervention of a grand jury. In larceny, embezzlement, burglary and murder, in addition to the public wrong which constitutes the gist of the offense, there is also a private injury, peculiar to the person whose property has been stolen or embezzled, whose house has been broken into, or whose relative has been killed, as the case may be; and as a rule the one who suffers this private injury will see to it that the machinery of justice is set in motion and the crime punished.

This is not so, however, in the case of bribery and other offenses

involving corrupt conduct upon the part of public officials. Here no one in particular suffers an injury peculiar to himself or different from that sustained in common by all persons living in the same community. The injury is inflicted upon the community as a whole; and here as elsewhere, the maxim holds true: "What is every one's business is no one's business." No one as a rule is willing to take upon his own shoulders the responsibility of beginning the prosecution of such a crime. To start the wheels of justice moving some one or some body of men who represent the interest and the welfare of the entire community must act. The grand jury, an institution more venerable than the common law, as old, indeed, almost as civilization itself, is the means provided for the discovery of this species of crime. Through the grand jury the law of the State speaks in the name of the whole people, impartially denouncing crime wherever it may be found, vindicating innocence wherever it exists and defending the liberties of the people from all unjust attack.

Not only is the grand jury charged with the special duty of accusing those who have directly wronged the public, but it also has at its disposal the means for properly accomplishing this work. Without stating its reasons or outlining its purposes, it may compel the attendance of witnesses and the production of books and documents. It meets in secret and usually enjoins secrecy also upon all who appear to testify before it. Thus its action cannot easily be anticipated, influenced, forestalled or frustrated, as proceedings before an examining magistrate may be; for secrecy of procedure is the one essential prerequisite to the obtaining of legal evidence of this species of crime.

Second only in importance to the employment of grand juries as a legal agency for the repression of political corruption is the assistance furnished by immunity laws. Such statutes have been devised as substitutes for the constitutional privilege against compulsory self-incrimination, and while fulfilling this legal requirement also compel the disclosure of evidence of crime which otherwise would go unpunished.

Bribery, which is by far the most frequent offense involving political corruption, is essentially a crime of darkness. As a rule but two persons have knowledge of it, the bribe-giver and the bribe-taker. Of disinterested spectators there are none. Instead, the parties to a bribery transaction contrive to meet in secret, there arrange the details of their compact in private and leave behind no record or memorandum of it. Each is equally guilty, and each has the strong-

est motive, therefore, for concealing the crime. In the absence of an immunity statute, for either to disclose the transaction may result in his own prosecution; for in such case his admission of guilt can be used against him, while as to his partner in crime it would be mere hearsay, not evidence. Under these circumstances the punishment of this and kindred offenses has often been placed practically beyond the power of the law.

To meet this situation and to enable those charged with the enforcement of penal statutes to cope with crime of the sort here under consideration, immunity laws have been enacted. If it be said that it is unjust that bribe-givers should be permitted to go free while bribe-takers are sent to prison, or *vice versa*, the answer is, that it is better that one of two guilty persons should be given immunity than that both should escape prosecution, and a crime which strikes at the very foundation of free institutions should go entirely unwhipped of justice.

Favoritism has no place in the administration of such a law and is not a constituent element of it. Like the principle of self-defense, the immunity idea is based on the law of necessity and can never be justifiably invoked where sufficient evidence may be obtained without resorting to it. In the practical administration of this law, those who first tender evidence of offenses, such as are here under consideration, will ordinarily receive immunity from prosecution for their part in the transaction, simply because their proffer is first in point of time. Should two witnesses to the same transaction offer to turn State's evidence at the same time, as has occurred, an interesting race for the grand jury room is assured. Even in such a case, however, no serious difficulty can arise. The principal offender should be prosecuted and his victim given immunity upon testifying as required by law. Nor will the fact that one of these persons is a bribe-giver and the other a bribe-taker be of any significance or assistance in solving the problem. In one case, the bribe-giver may be the chief offender, and the bribe-taker one who, though fairly honest, has been tempted beyond his power of resistance. In another case, the bribe-taker may be the principal felon and the bribe-giver a business man of ordinary honesty who submitted to the exactions of those in power very much as the solitary, unarmed traveler submits to the demands of a highwayman. Questions such as these afford no legitimate place for dogmatism or theorizing. Each case must be considered and dealt with upon its own peculiar facts and circumstances.

Effective as the immunity law thus is as a weapon in the hands of

those engaged in the prosecution of official misconduct, it is even more powerful as a preventive of this species of crime. Wherever a statute of this sort exists, every person who plans or contemplates the commission of bribery is charged with notice that as soon as he attempts to put his unlawful intention into execution he will have placed himself at the mercy of his accomplice, who may at any time safely turn about and expose him. This consideration alone justifies the enactment of immunity laws, and well illustrates in this modern field of jurisprudence the wisdom of the ancient maxim, "an ounce of prevention is worth a pound of cure."

Provided with an honest grand jury and armed with an immunity law, any community can, if it will, root out and expose political corruption so far as legal agencies are capable of uncovering and arraigning at the bar of justice crime of any sort. But the conviction and punishment of those arraigned is a far more difficult task.

This is so from the very nature of the case. In bribery, for example, the testimony of the accomplice or partner in crime, when clear and convincing, is always sufficient for indictment, but may prove inadequate at the trial. The defendant, whether guilty or innocent, can, if he will, oppose his oath to that of his accuser as to every material circumstance in the case and summon to his assistance from among his friends the full complement of witnesses who will swear to his former good character and unspotted reputation. It is true that sometimes there may be additional corroborative facts upon the side of the prosecution; but ordinarily the case will go to the jury upon the oath of the State's principal witness, in opposition to that of the accused. The situation of this witness, moreover, is not above criticism, nor can his credibility be placed beyond question. Of necessity he is a self-confessed criminal, whom, if his testimony be true, the immunity law alone keeps outside of prison bars. Then, too, there are always the presumption as to the defendant's innocence and the burden of proof resting upon the State to establish his guilt beyond a reasonable doubt. Under these circumstances is it strange that in many cases where good people are well satisfied there was guilt there should be acquittals at the close of jury trials?

In such cases, however, the mere fact of prosecution is not without significance. Though ultimately unsuccessful a public trial may have accomplished all or nearly all that a conviction could. Here the facts are laid bare beneath the eye of the whole community, and public opinion draws its inferences from such facts quite independ-

ently of the verdict of the twelve men who happened to sit as jurors in the case. And, after all, the breaking up of a vicious system and the elevation of the standard of official honesty, not the punishment of any man or set of men, are the important things.

In like manner great good may be accomplished and a real victory for honest government won, wherever official misconduct is even fairly, impartially and fearlessly charged with crime. In a country such as ours, public opinion is unquestionably a mighty force. Anything which goes to mold it by arousing public attention and directing public thought to specific wrongs which threaten the State, is of the highest significance and value. The average person, moreover, who commits bribery, or any of the crimes which involve political corruption, suffers quite as much punishment as a conviction can impose before his case is even called for trial. Exposure and disgrace, the deserved estrangement of old time friends, the inevitable and almost unconscious suspicion of even his nearest kindred, his own remorse, heightened and intensified a hundred fold because of an awakened public conscience—these are the things, more than prison stripes, which strike deepest into the heart and most mortally wound the pride of the average man who has risen in business or official station sufficiently high to have an opportunity or a motive for the commission of this species of crime.

I speak now, of course, only of those who, though guilty in fact, cannot be or have not been convicted. That there are many such no well informed person can doubt. Manifestly the great danger here, however, is that innocent men may be unjustly accused under circumstances which make it very difficult, if not impossible, for them completely to vindicate themselves. In such cases great and even irreparable harm may be done. The only safeguard against this possibility is the exercise of caution and sound judgment, equal care at all times for the rights of the accused and the State, and the prosecution of no one for a merely technical offense in which there is not also moral turpitude.

In the work of prosecuting these quasi-political offenders serious obstacles, of course, are encountered at every turn. From the beginning to the end, not only of each case, but of each campaign against official dishonesty, they line the road at almost every point.

First in order of treatment, though possibly not of importance, is incompetence, timidity and disloyalty on the part of prosecuting officers. An illustration of what I mean was recently furnished in

this State in a case where a district attorney was removed from office by the governor because of his refusal to prosecute indictments for bribery which had been returned by the grand jury of his county. Fortunately instances of this kind are rare. But when they occur the gravity of the situation needs no comment. If the man who must bear the chief burden of this work is not equipped or lacks relish for his task, little indeed can be expected in the way of accomplishment.

Next and more important among these obstacles are weak and perverse juries, both grand and petit. Some trial juries seem to be immune to evidence of crimes involving official dishonesty and refuse to convict no matter how overwhelming the proof of guilt may be. Not to be outdone, grand juries have likewise refused to indict, although abundant evidence to warrant such action was submitted to them. It is matter of current history that the law relating to the manner of selecting grand jurors in this State was recently changed because it was found, at least in some localities, that grand jurors selected in the old way by aldermen and supervisors would not do their duty.

Unfit jurors are attributable principally to two causes: lack of care, judgment, honesty and discrimination upon the part of those who make up the lists and the disinclination of good men, when selected, to serve. The latter cause is constantly operative. It is a familiar scene upon the first day of each term of court to see the strongest and most capable men upon the panel file up, one at a time, before the judge to present their reasons, good, bad and indifferent, why they should be excused from jury duty, and to witness the best material thus melt away under the kindly, good-natured, and obliging disposition of the judge.

The witnesses called by the prosecution in actions involving political corruption often sympathize more with the defense than with the State and their disposition whenever possible to suppress evidence, distort facts and suggest defensive matter is another obstacle to the successful prosecution of this class of cases. At the trial it is not unusual indeed to find the State's principal witness in league with the accused and willing to tell the truth only so far as he may be compelled to do so under fear of prosecution for perjury.

Erroneous rulings prejudicial to the State made by trial judges upon matters of law constitute another serious impediment to the success-

ful prosecution of these offenses. In this class of cases legal technicalities invariably assume formidable proportions. The plain, ordinary, unofficial crook who steals in the old-fashioned way when no one is looking, and not by securing the passage of a resolution through the county board or common council or a bill through the State legislature, when charged with crime usually comes into court, pleads not guilty to the information, and goes to trial upon the merits in the court where he is arraigned.

Not so with the suspected grafter. He usually begins battle with the State by filing an affidavit of prejudice against the presiding judge. This, of necessity, will compel a change of venue to another court, and will occasion delay, sometimes a delay of many months. When the case is finally called for trial in the court to which it has been sent his usual practice is to file a plea in abatement, in which the existence and regularity of almost anything under the sun, no matter how remotely connected with the indictment, may be challenged. If this plea be ruled against him, he will demur. If the demurrer be over-ruled, he will next interpose a motion to quash the indictment. If this be denied, he will then file a special plea in bar. If beaten upon this issue also, he will reluctantly plead to the merits, and if convicted will promptly obtain a stay of execution for the purpose of enabling him to appeal the case to the supreme court. Thus the trial upon the merits may be the smallest part, and often is the least interesting proceeding connected with the whole case.

Needless to say, the attorneys who represent defendants in these cases are among the leaders at the bar. No money, no effort, no ingenuity will be spared to save the least of these distinguished gentlemen from merited punishment; for, no matter how poor or humble or insignificant the individual grafter may be, back of him stands the whole body of corruptionists, the political boss and the special business interests he represents, all of whom have waxed fat by means of the grafter's knavery.

Every one of these dilatory pleas involves delay, and delay usually weakens the State's case. Undoubtedly it is often with this object in view that resort is had to them.

Upon any one of these questions the trial judge, if he be weak or partial to the accused, may make a ruling which will then and there end the prosecution forever. For, as a rule, the State has no right of appeal in criminal cases. If it had this right, as it should, weak and vacillating judges would no longer resolve every doubt against the

State, in order thereby to avoid reversals in the supreme court and so keep their records clear.

By no means least important in the catalogue of obstacles to the successful accomplishment of the work here under consideration is the senseless rule at present recognized by a great majority of appellate courts in this country upon the subject of new trials. An English critic of American institutions in a recent article very succinctly and truthfully states the case against us as follows:

The criminal procedure of America today is very much as ours was in the time of the Stuarts. It is hopelessly entangled in technicalities, and neglects justice and common sense to chase after an impossible infallibility of form. In a criminal case, as it is conducted across the Atlantic, it is not the prisoner in the dock, but the judge on the bench who is really on trial. The counsel on both sides polish up a thousand little points of pleading and practice and evidence, and fire them off at the judge, who has to decide them offhand. If he falls into a single error, no matter how trivial or how far removed from the question of the guilt or innocence of the accused, the appellate court will order a new trial of the case almost automatically.

A few courts of last resort in this country have adopted another and more rational view. By them new trials are granted only where the substantial rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had. They seek first to ascertain from the evidence whether the defendant is innocent or guilty. This, not subtle refinements of pleading and practice, is made the vital question. If his guilt is clear, alleged errors not affecting his substantial rights will be unceremoniously brushed aside.

Moreover, even supreme court judges sometimes become extremely partisan. It is interesting now to turn back to the opinions written in bribery cases when the present crusade against political corruption was only just begun. Passing by the Tweed case in New York and the Butler case in St. Louis—monuments both to the bad law which such partisanship may promulgate in order to protect a political favorite or save from prison a party boss—let a single instance suffice. In the Meysenburg case (71 S. W., 229) decided five years ago by the supreme court of Missouri the majority opinion savagely attacked Mr. Folk. Almost everything he did in the conduct of that case in the court below was reviewed and criticised, and the opinion then concluded with the following stump speech :

This record abounds at every turn with errors committed, but none of them, however, in favor of defendant. It would fill a volume

properly to note and comment upon them. It will not be attempted. Those already mentioned must be taken as indices of the rest. But I will say this for the record at bar—that it occupies the bad pre-eminence of holding a larger number of errors than any other record in a criminal case I ever before examined, and that, if this record exhibits a sample of a fair trial, then let justice hereafter be symbolized by something other than the blind goddess with sword and scales.

Decisions such as these by courts of last resort, based now upon partisan bias and again upon technicality and legal hair-splitting to the utter disregard of the claims of justice and the suggestions of common sense, are specially vicious in their far-reaching effect upon trial judges. Intimidated by them, cautious men upon trial benches too often become dwarfed in function and paralyzed in judgment until they are mere "umpires at the game of litigation."

Another obstacle to reform along the lines here proposed is hostile public sentiment. All men are opposed to dishonesty in the abstract and are willing to applaud an assault upon it undertaken in another city, county or State. But it makes a world of difference whose ox is gored. Outside of St. Louis the whole country approved Mr. Folk's conduct as circuit attorney; but had he, upon the record thus universally applauded, sought renomination and reëlection to that office, it is safe to say that the voters of St. Louis would have overwhelmingly and enthusiastically defeated him. The treatment his candidacy for governor received there shows this. Mr. Henry once told a Los Angeles audience that when he was engaged in prosecuting timber and land thieves in Oregon he came to visit his old home in San Francisco and found the whole city back of him in his work. But when he came to San Francisco and began his campaign there against graft, only a divided city was back of him. And it is so everywhere. Reform of ourselves or of our city is seldom either pleasant or popular. Besides, to assail political corruption, no matter where, is to throw down the gauntlet to the most powerful political and financial influences. It is only natural that these forces should resist the assault with all the power at their command and should even assume the offensive and in turn make war upon the agencies of the law engaged in the task of enforcing its penalties against them. Thus, venal newspapers will be enlisted in the contest and an undereurrent of hostile sentiment will be started, which, sooner or later, will manifest itself in mis-trials, perverse verdicts,

adverse rulings by trial judges and indefensible decisions by courts of last resort.

Notwithstanding all these difficulties, however, political corruption may be repressed by legal means. Recent history proves this. To doubt that in the future this history will be repeated is to doubt the permanency of free institutions and the capacity of a free people for self-government.

## PROBLEMS OF CRIMINAL JUDICATURE IN CHICAGO AND HOW THEY HAVE BEEN SOLVED BY THE MUNICIPAL COURT

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Prior to the establishment of the municipal court in the fall of 1906, criminal justice was administered in the city of Chicago by the courts of the justices of the peace and by the criminal court of Cook county.

The courts of the justices of the peace were a remnant of the town system of New England, which was adopted and established throughout the State by the early settlers of Illinois. Satisfactory in rural districts, where the sparsely populated community is composed of generally honest and law-abiding citizens, in a crowded city it soon became an engine of graft, dishonesty and corruption dominated by unscrupulous politicians.

The justices of the peace in the city of Chicago were appointed by the governor of the State of Illinois on the recommendation of the judges of the circuit and superior courts of Cook county. Those justices who tried criminal cases were known as police magistrates and sat in courts attached to the various police stations of the city. They were appointed to their posts by the mayor and their appointments were confirmed by the city council. The mayor usually recommended for appointment to the various courts such candidates as were designated by the political leaders of his party in the wards in which such courts were located, and the clerks and bailiffs were appointed by the mayor on recommendation of their aldermen. When Chicago became a great city, this system outgrew its usefulness and bred evil practices under which judges in some cases became the servile creatures of politicians. The guilty friend of an alderman might go his evil way, while an enemy, no matter how upright, was liable to false arrest and continuous persecution, if he refused to comply with the bidding of the reigning politician of his ward. In other cases, the court bailiff would be the boss' lieutenant, and receive his orders direct, and be ready with professional bailsmen

either to rescue the guilty or abuse the innocent. Were his patrons' plans likely to be frustrated by a jury trial, the bailiff was prepared to secure the desired verdict by calling jurors whom he had instructed beforehand. The clerk on his side would attend to the orders; if the bailiff made a slip, the clerk might be relied upon to correct it in the record. It was current rumor that every day a list of cases to be tried was submitted to the boss and that he checked up on this list results which he desired, returning it to some trusted attaché of the court to be acted upon. The justice who was there to assess heavy fines or light, to find guilty or acquit, to have arrested or liberated, found his judgment too often swayed by political considerations. The justice court was a cancer gnawing at the heart of the community. A great wave of public opinion directed against such a condition of affairs led to the establishment of the municipal court in 1906.

Although the method of selecting officers for the police court had become, in some cases, sufficiently vicious to defeat the administration of justice, yet there was another defect in the court's organization which detracted from its effectiveness, and bred delays and inefficiency. This defect was the court's limited jurisdiction. It may have been as well under the circumstances that the court's jurisdiction was limited, but even if the court had been properly organized, its jurisdiction was too narrow. The court's criminal jurisdiction was two-fold: It had power, first, to dispose of minor criminal cases where the penalty was by fine not exceeding \$200; and second, to sit as examining magistrate and hear complaints in charges of State felonies and misdemeanors, with power to bind over to the grand jury for indictment. Hence, the police magistrate must turn over to the criminal court of Cook county for trial all cases of felony and misdemeanor, where the punishment was more severe than by fine of \$200.

The criminal court of Cook county is a court of record with original jurisdiction. It is presided over by judges of the circuit and superior courts of the county, who are assigned to it from time to time. The circuit court has fourteen judges; the superior court twelve. Three judges from each court sit on the appellate bench, and one judge from the circuit court sits in the juvenile court. This leaves but nineteen judges to perform all the civil and criminal work of importance in the county. That these courts were inadequate to the demands of justice is shown from the fact that the superior court in 1906 was two to three years behind its calendar and the superior court four to five years, while the criminal court had bail cases untried,

some of them five years old. From three to six judges from the circuit and superior courts sit in the criminal court, the number depending upon the press of business in the different courts. These judges with difficulty can try 2500 cases a year. With 3700 indictments returned in 1905 and 1906, small wonder that it was necessary in 1905 to carry forward 1662 criminal cases undisposed of, and in the following year, 1303. To remedy the congested condition of these courts was one of the primary objects for the establishment of the municipal courts of Chicago.

The municipal court of Chicago consists of a chief justice with a salary of \$7500 per annum, and twenty-seven associate justices paid \$6000 per annum. Their term of office is six years, and nine associate judges are elected every second year. The law provides that the chief justice's salary may be increased to \$12,000 on vote of the city council, and the salaries of the associate judges to \$10,000. The judges of the circuit and superior courts receive salaries of \$10,000. Honest, intelligent and experienced judges can only be obtained at high salaries, and the law thus provides for men of good caliber for the municipal bench. Being elected by the people for long terms, the judges are free from political influence; being paid a liberal salary, they have no motives to encourage litigation. How different was it under the justices of the peace, when the fee system was in vogue, and the justice who tried the most cases received the greatest returns.

The municipal court has a clerk and a bailiff, each paid a salary of \$5000 a year, and elected for a term of six years. The clerk and the bailiff may appoint under them such number of deputy clerks and deputy bailiffs as may be determined from time to time by the majority of the judges. There are at present 106 deputy clerks, and 96 deputy bailiffs. The bailiffs are ex officio police officers, and vice versa, police officers are ex officio bailiffs. In this manner, the police are brought under the direct control of the court. The judges have general supervision over the offices of the clerk and bailiff, and may pass rules and regulations governing them. They fix the salaries of the deputy clerks and deputy bailiffs, and may remove any of them from office with or without cause, by passing the proper order. During the past year, the chief clerk of the court was dismissed for dishonesty, and two of the deputy clerks were discharged for other causes. This power in the hands of the judges to dictate the administration of the court, brings about prompt and efficient service and respect for the judges on the part of all the officials.

The law provides that the judges shall meet as a board of directors once a month, presided over by the chief justice as executive officer, and at such other times as may be required by the chief justice for the consideration of such matters pertaining to the administration of justice as shall be brought before them. They shall at such meetings investigate complaints, such as incompetency or inefficiency on the part of officials of the court, or dishonesty on the part of police officers or unprofessional conduct on the part of lawyers in suits pending in the court, and even complaints against the judges of the court themselves. The law provides that after hearing all complaints the judges shall take such steps as they may deem necessary or proper with respect thereto, and they shall have power, and it shall be their duty to adopt all such rules and regulations for the proper administration of justice in the court as to them may seem expedient. These monthly meetings of twenty-eight judges, at which court questions are openly discussed, seem to guarantee the highest integrity and efficiency in the administration of the court.

The law provides that at least one judge shall be in attendance in one branch of the court in each district where the courts are located six hours of each day in the year, excepting Sundays and holidays, and in the business district, instead of six hours the court shall be kept open eleven hours a day, from 9 a. m. to 11 p. m., with two hours intermission. The law further provides that each associate judge at the beginning of each month, shall, under oath, make a written report to the chief justice of his work during the preceding month, and shall specify the days and hours of his attendance at the branch court to which he may have been assigned. In other words, speedy justice is dispensed by the municipal court at all its branches at all reasonable hours on every day of the year, except Sundays and holidays.

The chief justice, besides having all the powers of a judge of the court, has general superintendence of the business of the court. He assigns the associate judges to duty in the branch courts in such manner as he may deem necessary for the prompt dispatch of the business of the court, and he also superintends the preparation of the calendars of cases for trial, and makes such classification and distribution of cases upon the different calendars as he deems proper and expedient. This power to distribute and assign judges and cases is a great aid to the prompt dispatch of business. If there is too much work in one district, it can be either transferred to courts where the work is not so heavy, or extra judges can be sent to the congested

district to help dispose of the cases there. The amount of work and the dispatch with which it has been attended to by the municipal court during the year 1907, is shown by the following figures: During the year, 37,104 civil cases were filed, 30,877 were disposed of, and 6227 remained on the calendar to be tried in 1908, most of which were continued at the request of litigants. In its civil work alone, the court disposed of more cases in 1907 than the circuit court throughout the entire State of Illinois, not including Chicago. In its criminal branches, 15,079 cases were filed in 1907, 14,755 were disposed of, and but 324 were left on the criminal docket to be tried the following year. These cases can be disposed of as soon as they are ready for trial. For violation of city ordinances, 45,535 were filed during the year, and 44,472 were disposed of. The total number of cases filed in 1907 was 97,718, and disposed of, 89,104. The municipal court in number of cases filed and disposed of is the greatest court of record in America, if not in the world.

It is the duty of the chief justice to have competent persons summoned to serve as jurors, to inquire into their qualification and to reject such as do not appear suitable. During 1907, Chief Justice Olson has personally inquired into the qualifications of all jurors. He has made a point of selecting citizens of the best type, and no person suitable for service has been excused except upon an honest showing of good cause. On the other hand, men of uncertain character or doubtful standing have been forthwith rejected. A vice-president of the Santa Fé Railroad, and the head of one of the largest coal companies in Chicago spent two weeks of their valuable time last fall discharging their duty to the community side by side with their fellow-citizens.

The municipal court has original jurisdiction in all cases, both civil and criminal, excepting criminal cases where the punishment is by imprisonment in the penitentiary or by death, and civil damage cases where the amount involved is over \$1000. But these excepted cases can be transferred to the municipal court for trial from the criminal, circuit or superior courts where they originate. Thus, a limited class of cases is reserved for the older courts, but if these courts are congested, the municipal court is ready and able to give them aid. So, in practice, the municipal court has jurisdiction over all classes of cases, both civil and criminal.

The municipal court is a court of record. It has the right to adopt its own rules of practice and procedure, and the decision of a judge

on a question of practice is conclusive, unless it shall appear that substantial injustice has been done. The court's decisions are subject to review only by the appellate and supreme courts. The municipal court is, therefore, a court of record, a court of first instance, with comprehensive and practically general jurisdiction, a court of last resort unless the merits of the case are involved. No wonder that there have been few appeals from its decisions, when error for technicalities of practice is impossible. During the first six months of the court's existence, 40,610 cases were decided; only 92 of these were taken to the appellate or supreme courts, and of those 10 were dismissed, supersedesas denied in 11, issued in only 27, and the number of reversals out of 19 is not yet recorded.

The requirements as to bail were extremely lax in the courts of the justice of the peace, and this resulted in the growth of a tribe of professional bondsmen, who, with the connivance of officials of the court, made a practice of giving straw bail for the release of prisoners on bond, who, as soon as they regained their liberty, escaped. The requirements in the municipal courts regarding the acceptance of bonds are extremely severe. The bondsman must answer the most searching questions upon oath, and make out a schedule of property, which is investigated before the prisoner is admitted to bail. Out of several thousand prisoners admitted to bail during the year 1907 on charges of State misdemeanors, less than one-half dozen failed to appear for trial.

One of the most desirable changes effected by the new municipal court act, is the practice of the court's instructing the jury orally. This practice was adopted instead of that of reading and submitting written instructions to the jury, as is done in other courts of the State. The latter mode is cumbersome, because of the length and number of instructions which are usually submitted by counsel for each side, and misleading because an instruction written by counsel often presents the law in such a way as to make it seem applicable only to one side of the case. Under the method of instructing the jury orally, the judge states to the jury in his own language such principles of law as he thinks are material. The attorneys are then requested to direct the court's attention to anything omitted or to any error which they think the court has made, and the court may then, in the presence of the jury, correct such error. If counsel wish to except to the court's instructions, they may do so before verdict, in order to take advantage of error on appeal.

A new system of keeping records has been adopted for the municipal court. The law authorizes the chief justice to prescribe abbreviated forms of entries of orders in the records, and that these abbreviated forms shall have the same force and effect as if the orders were entered in full in the records of the court. Twenty men or about one-fifth of the clerks of the municipal court were able to write in a period of six months, the records of the court in 46,222 cases in abbreviated entries. The minutes of a case are kept by the clerk in abbreviated form upon a blank half sheet, 8 by  $10\frac{1}{2}$  inches, which is filed with the papers of the case; this half sheet is a facsimile of a half page of the permanent record book, upon which these minutes are subsequently recorded to compose the record. To illustrate: The abbreviated entry of an order: "Deft. sent to H. of C. term and fine," means that the judgment is to the house of correction for a definite time, and to pay a fine of a certain sum, and in default of the payment of the fine, the defendant to stand committed to the house of correction until fine and costs are paid. The judgment, when written in full covers two typewritten pages and contains approximately 496 words. The law provides that when any certified transcript of the record is required, the same shall be written out in full from the abbreviated forms, and duly authenticated, according to law.

The following figures show some of the changes that have taken place in the administration of criminal justice in the city of Chicago since the advent of the municipal court:

In 1906, there were in Chicago, 92,761 arrests; in 1907, there were 57,490, a decrease of 35,271, or  $37\frac{1}{2}$  per cent.

In 1906, the number of arrests for State felonies amounted to 12,561, in 1907 to 10,464, a decrease of 2097, or  $16\frac{1}{2}$  per cent.

In 1906, there were 8908 arrests for State misdemeanors, in 1907, 8238, a decrease of 670, or 8 per cent. The municipal court has, therefore, had its effect upon the community in the prevention of crime.

In 1906, 8876 persons were sentenced to the house of correction convicted of State misdemeanors. In 1907, 10,948, an increase of 1272, or 14.3 per cent.

In 1906, 480 persons were sentenced to jail, convicted of State misdemeanors, in 1907, 635, an increase of 32 per cent. Thus, although the arrests for State misdemeanors decreased 8 per cent in 1907, the number of sentences to jail and to the house of correction for the same class of cases, increased to 15.2 per cent. The work of the municipal court has been effective in enforcing the law.

Before the establishment of the municipal court, all State felonies and misdemeanors, in which the punishment was more severe than by fine of \$200, had to be tried by the criminal court. The docket was so crowded, that courts were unable to try all the cases that came before them, and some of the untried bail cases were four to five years old. In 1906, 3656 indictments were rendered, in 1907, this number was reduced to 2244, or 39 per cent. The municipal court has relieved the criminal court completely of the congestion to which it was so long subject.

Many attempts have been made to reduce the percentage of crime in the city of Chicago; among them was the addition to the police force of 1000 officers in 1906, but none of these attempts have shown appreciable results. Under the administration of the municipal court, the crime problem has been attacked along the following lines:

1. Speedy trials.
2. Strict bail regulations.
3. House of correction rather than jail sentences.
4. Care in the issuance of warrants.
5. Absence of interference with the administration of justice in the courts, and consequent encouragement of police officers to do their duty.
6. Imposition of heavy penalties for the carrying of concealed weapons.

A reduction of the number of arrests, an increase in the number of convictions, a speedy disposal of cases has been the result.

A word in closing in regard to the finances of the court may be interesting. The total receipts of the court for the year 1907 in fines, costs and fees collected were \$669,962.01, and the total expenses, \$650,721.95, leaving a balance of \$19,240.06 in favor of receipts over and above all expense. But of these expenses, \$70,000 was paid in renting quarters for the court before it moved to its new home in the municipal court building. Subtracting this extraordinary expense of \$70,000 from the expense account leaves \$580,721.95 as the reasonable cost of running the court for the year 1907—a sum which is \$89,-240.06 short of the total amount of fines, costs and fees collected by the court during the year.

## GERMAN AND AMERICAN CRIMINAL LAW COMPARED

Note furnished by Rudolf Leonhard, professor in the University of Breslau, and Kaiser Wilhelm professor in Columbia University, New York.

*Gentlemen:* You were so kind as to invite me to make some informal remarks about the reforms of criminal law.

I am a former judge of criminal trials and at present professor of Roman law, of which the criminal part has been restored in an admirable way by Theodor Mommsen. Therefore, I dare to utter my opinion also about criminal subjects.

Unfortunately my knowledge of the American criminal law is a very superficial one. But in spite of it I venture to make some general observations, although not based on a special study of your institutions.

There is a great difference between the criminal law of this country and the German law. Especially the national unity of German law is in striking contrast to your mutually exclusive jurisdictions of the single states on this subject. We have had a common written law for Germany from the sixteenth century. Our common law is only supplied by special statutes of the states.

This unity of law corresponds to the unity of social life and social connection between the parts of the empire in a high degree.

Secondly, we live in accordance with the rule: *Nulla pena sine lege*, namely, *sine scripto jure*. This rule is not at all a matter of course, but a result of a historical development. It is not even perfectly satisfying, because the possibility of punishing offenders, whose crimes do not fall within the narrow frontiers of written texts, has some advantages. But we mean in our country, that these advantages must be sacrificed to a higher degree of civilization and especially to the sentiments of pity for the broad classes of people, who come into conflict with the criminal laws and who can expect and demand a specific definition of what is forbidden and what is permitted.

It would be difficult for you to come directly to a written common criminal law and to the rule: *Nulla pena sine lege*, because your Constitution obliges you to respect the legislative power of the commonwealths.

But Germany was in former times in the same difficulty and overcame it in two ways, which are open also for you, namely, by an agreement between the different states about the intention of their different laws and by a general national science.

An agreement between the governments created the unity of our commercial law. All states of the old German confederation accepted the same commercial code as a law given by themselves. In the same way you can destroy all superfluous differences between the statutes of the different States.

The customary laws can be written by learned specialists, whose books, when they are worthy, may be elevated to the authority of a code by the practice.

The activity of criminal judges in transgressing the boundaries of statutes and written customary laws can be avoided also in America by the law courts themselves in accordance with the political reasons for such a self-restraint.

If these observations seem to you not worthy to be respected, please excuse my shortcomings for the sake of my good intention.

## THE PUBLIC SERVICE COMMISSIONS LAW OF NEW YORK STATE

BY HON. THOMAS M. OSBORNE

*Member of the New York State Public Service Commission*

Not long ago, New York's public service commission of the second district held a session in the city of Rochester. A gentleman representing the chamber of commerce of that city opened the proceedings by a brief address, saying some pleasantly flattering things about the commission, and eulogizing the law which had formed it; adding in effect that the business men of Rochester had favored the law and welcomed the commission; that they welcomed it especially because they regarded it as a great barrier of safety for the business world against dangerous socialistic ideas, such as government ownership of railroads and the like.

Sitting as a member of that commission, I could not help smiling at an amusing coincidence. Exactly one hour before, on the train coming from Buffalo that morning, I had been greeted by a pleasant gentleman, who introduced himself saying that he had attended all our sessions in Buffalo; adding with much enthusiasm that he especially welcomed the public service commissions law as he regarded it as the first great step in the direction of government ownership.

It is surely not often that a law can thus receive the unqualified approval of those who are diametrically opposed in their theories; and I am inclined to think that it is an evidence of the real statesmanship underlying the law that it can be thus recognized by both sides as a step in the direction of ultimate truth—whatever the nature of that ultimate truth may turn out to be.

In the relations of its public service corporations to the public on the one side and the State on the other, New York has suffered as much as any State of the Union from reckless disregard of the rules of sound finance. In fact we have had more than our share of that violation of monetary sanity, of economic morals (to say nothing of economic decency) which has attended the great development of our public utilities in the last fifty years. From the days of the old New

York Central and Erie Railroad fights down through those of the Broadway Surface Railroad, to those of the "Interborough Metropolitan," that history has been one of disorder, scandal and disgrace. The public conscience, stimulated by the public interest, has at times cried out and effected spasmodic reforms; but New York public service corporation finance has still remained what old John Adams nearly a century ago called its politics, "the Devil's own incomprehensible."

But of late years, stimulated by more careful analysis and study of the fundamental character of public utilities on the part of lawyers and economists, there has been growing up a deep and widespread sense of injury and grievance. It is not unnatural that this should be so; how could it be otherwise, when the people watched the operations of various reckless promoters and financiers, and saw those favored individuals amassing vast fortunes, the origin of which lay in the public grants of franchises given away by State or municipalities, and too often given by faithless public servants under revolting concomitants of bribery and corruption.

It would be a tempting task to enter upon a detailed study of the various elements in the resulting situation, and especially as related to politics; but such an inquiry would carry us too far afield. To understand the origin of the New York public service commissions law, however, it is necessary to refer briefly to the State election in 1906 and to recall the fact that at that time the wrath of a long-suffering and much abused public seemed to be fast gathering to the point of political explosion.

It is at such periods, when the people have lost confidence in their servants, in their old leaders, in the very framework of the social structure; have apparently almost lost faith in democratic self-government itself and are calling for some political Moses to lead them out of their bondage, that there comes the moment eagerly awaited by the demagogue. Trading upon the righteous anger of the just, upon the prejudices of the unreasoning, upon the cupidity of the mercenary, upon the timidity of the politician, the demagogue becomes suddenly a menace to society; a menace, not because he may not be entirely right in his analysis of the situation, but because from the nature of the case he is a destructive and not a constructive force; and because he is always seeking, not how to apply genuine remedies, not how to safeguard the interests of the mass, but only how to turn the situation to his personal advantage; a menace, because even if he is honest in his aims,

he has faith in progress by revolution rather than progress by evolution, believing in miracles rather than in science.

The difference between the demagogue and the statesman is cleverly illustrated in a story told by Lord Cromer in a recent speech:

A conjurer exhibited in London some few years ago. He invited one of the audience to lend him his hat. He then, to all appearances, cut it into small pieces, and eventually, of course, gave it back to the owner uninjured. He then invited anyone among the audience to do the same. A young officer of the army stepped on to the platform and said he would like to try. He borrowed a hat from a confiding old gentleman, and cut it into small pieces. Then he stepped down from the stage with the remark, 'I can only do the cutting part. I leave the rest to the professional conjurer.' The owner of the hat" adds Lord Cromer dryly, "was not altogether satisfied."

It is distinctly to the credit of the people of New York State that in the midst of a genuine crisis of political feeling there should have been shown such careful weighing of all considerations before political action; that amid forceful appeals to passion and prejudice, based upon undoubted public grievances there should have been upon both sides so much honest endeavor to think clearly and act justly. Probably at no election ever held in New York was there so complete a breakdown of the ordinary political barriers. Republicans by thousands voted the democratic ticket in whole or in part; democrats by tens of thousands voted the republican ticket in whole or in part. While outwardly the old party forms were maintained, in reality party ties in a large measure ceased to exist.

It was in truth not merely an interesting, it was a momentous election; and one the importance of which, not only to the people of New York State but to the whole nation, becomes more evident the farther away from it we get. As the campaign developed it became a genuine choice between the gospel of disorder,<sup>1</sup> under cover of a righteous outbreak against existing conditions on the one side, and on the other calm, sane and orderly progress. And it is a humorous illustration of the irony of history that the republican party, which of the two political parties may fairly be held by far the more responsible for the evils of the situation, should have been the one to place in nomination the genuine reformer; while the democratic party should

<sup>1</sup> "As between rottenness and riot," said Mr. Bourke Cochran, when defending his candidate at the Buffalo convention, "I prefer riot." An unique way, certainly, of recommending a man as nominee for governor.

have thrown away the chance of a generation by allowing its opponents to play once more the old game so aptly described by Disraeli at the time of the repeal of the corn laws, when he averred that Peel had caught the whigs in bathing and run off with their clothes.

The result of the election was to seat in the governor's chair an able and successful lawyer, a republican who aims always to place State interests before partisan advantage, a man of the sincerest and most confirmed honesty, of high ideals of public service, of determined convictions yet open mind; moreover, a man who realized fully that his election was simply an expression of public confidence in him personally in the midst of his party's defeat. Governor Hughes realized to the full the political difficulties of the situation, and the dangerous temper of the public mind along with the genuine grievances which lay behind and were the cause of it; so he at once set himself to grapple with the dangers and difficulties of the situation in the calm temper of a true statesman. The public service commissions bill was the outcome.

## II

The law as it was passed contains five articles; the first establishes the public service commission and deals with certain general provisions; the second lays down the provisions relating to railroads, street railroads, and other common carriers; the third states the powers of the commission relating to such railroads, street railroads and other common carriers; the fourth deals with gas and electric corporations; and the fifth abolishes former railroad, gas and electricity, and rapid transit commissions and ends with a few general provisions.

The main points of the law may be briefly touched upon:

1. By article one the State is divided into two districts with a separate and independent commission of five for each district. The first district includes what is known as Greater New York, the four counties of New York, Kings, Queens, and Richmond (or New York City, Brooklyn, Long Island City and Staten Island), and the second includes all other counties in the State. The reason for this is perhaps more obvious to a New Yorker than to anyone outside the State; but the truth is that the problems in the two districts are so very distinct that the wisdom of the separation has become more and more apparent since the two commissions began their labors. For instance the great problem of rapid transit in New York City, involving the building of subways, and the closely related and equally difficult

problem of regulating the vast traffic across Brooklyn bridge at the end of each working day have no counterparts up the State. On the other hand the State has its own peculiar problems; the network of railways, large and small—each with its own system of management, good or bad—each with its own financial history, creditable or otherwise, and its existing or proposed issue of securities as a result of that history, this lies entirely outside of the city. In the city there is but one problem involved in the question of gas or electrical supply; in the State there are almost as many problems as there are communities with corporations supplying gas and electricity. One might say that in the city each problem is an obstinate and gigantic unit, while in the State each problem has such a dazzling multiplicity of units that it is both bewildering and elusive; in short the advantage of separate commissions must be obvious upon any serious consideration. (Sec. 3.)

2. The ten commissioners—five for each district—are appointed by the governor with the approval of the senate, and subject to removal by the governor "for inefficiency, neglect of duty or misconduct in office," after serving charges and giving due opportunity for a public defense. When the law was passed some objections were made to giving the governor this practically arbitrary power of removal; but it is obvious that that power should rest somewhere, and it is far better to throw the responsibility clearly upon the governor, who is and should be responsible for the administrative part of the State government, than to make him share that responsibility with a body like the senate. It is not possible to hold the individual members of a senate to account for failures in administration; but it is possible to hold the governor to account where he has the power of removal and appointment.

In politics as in business there is necessity for focusing the responsibility clearly upon the individual; and my own experience in city administration leads me to believe that where any legislative body is called upon to undertake the work of appointment or dismissal, which is properly an administrative function, it is more likely to keep an unfit public servant in office than to assist in ejecting him. If it is desirable to give to the senate any right to participate in a removal, then the power to remove should be granted to either the governor or the senate acting independently. Such an arrangement would obviate such a long and unedifying deadlock as occurred between governor and senate some twenty-five years ago, in the effort to

secure the removal of Thomas C. Platt from the office of quarantine commissioner. (Sec. 4).

3. After providing for counsel, secretary and business force, the law proceeds to declare ineligible to appointment as public service commissioner anyone holding

official relation to any \* \* \* corporation subject to the provisions of this act, or who own stocks or bonds therein. (Sec. 9.)

The law also provides that no commissioner or employee of the commission shall

solicit, suggest, request or recommend, directly or indirectly, to any common carrier \* \* \* the appointment of any person to any office" or to receive "any free pass or transportation or any reduction in fare \* \* \* or any present, gift, or gratuity of any kind

from any corporation subject to the the law. As the State pays traveling expenses when on business of the commission this provision is eminently wise as it prevents the sense of obligation which such favors inevitably tend to produce, even when the favor is dictated by the law itself. (Sec. 15).

4. A convenient and necessary provision gives each commissioner the full power of the commission in all investigations and hearings; although any order of a commissioner must be approved and confirmed by the commission before it becomes operative. Five hearings can therefore be going on at once, if necessary, and thus more work accomplished in a given time. (Sec. 11).

5. That at hearings and investigations the commission need not be governed by the technical rules of evidence is another clear advantage in the work of the commission. To the mind of many laymen, the rules of evidence often seem admirably calculated to delay the truth, if not to distort, obscure or conceal it; and in the work of the commission it is desirable to get at the facts as quickly and as clearly as possible. The object to be gained in most cases is immediate relief of some sort, and obviously "the law's delay" would largely destroy the efficiency of the commission. (Sec. 20.)

6. All witnesses are duly protected; the law providing that

no person shall be prosecuted, punished, or subjected to any penalty or forfeiture for, or on account of any act, transaction, matter or thing concerning which he shall under oath have testified or produced documentary evidence;

but this immunity does not extend to the corporation with which the witness may be connected. (Sec. 20.)

The commission is given ample power to force the attendance of witnesses and secure their testimony, refusal constituting a misdemeanor.

7. Article two prescribes the duties of common carriers which term includes, according to the wording of the act

all railroad corporations, street railroad corporations, express companies, car companies, sleeping car companies, freight companies, freight line companies, and all persons and associations of persons, whether incorporated or not, operating such agencies for public use in the conveyance of persons or property. (Sec. 2.)

Such common carriers:

(a) Shall furnish to the public

such service and facilities as shall be safe and adequate and in all respects just and reasonable" and "all charges made or demanded \* \* \* shall be just and reasonable and not more than allowed by law or by order of the commission. (Sec. 26.)

(b) Shall provide proper switch and side-track connections. (Sec. 27.)

(c) Shall file and keep open for

public inspection schedules showing the rates of fares and charges for the transportation of passengers and property;

and no such rate shall be changed without a thirty days notice to the commission unless duly authorized by the commission. (Secs. 28 and 29.)

(d) There shall be no "special rate, rebate," or unjust discrimination of any kind; no "undue or unreasonable preference;" no "free ticket, free pass, or free transportation of passengers or property" except to officers and employees of the railway and their families, ministers of religion, inmates of hospitals and other specified individuals. But this provision shall not prevent

the issuance of mileage, excursion or commutation passenger tickets, or joint interchangeable mileage tickets," nor "the issuance of passenger transportation in exchange for advertising space in newspapers at full rates.

Of course this latter exception to the general rule should be uniform; for instance a special commutation rate from Yonkers to New York must be open to anyone in Yonkers. (Sec. 31-33.)

(e) Every railroad corporation or other common carrier engaged in the transportation of freight shall, upon reasonable notice, furnish to all persons and corporations \* \* \* sufficient and suitable cars for the transportation of freight in carload lots." Railroads and street railroads "shall have sufficient cars and motive power to meet all requirements for the transportation of passengers and property." And "the commission shall have power to make and by order shall make, reasonable regulations for the furnishing and distribution of freight cars to shippers, for the switching of the same, for the loading and unloading thereof, for demurrage charges in respect thereto, and for the weighing of cars and freight offered for shipment or transportation by any common carrier. (Sec. 37.)

8. Article three continues the provisions relating to common carriers, dealing especially with the powers of the commission for carrying the provisions of article two into effect. Power is given to the commission:

(a) To examine into the "general condition, their capitalization, their franchises" and management of all common carriers. (Sec. 45.)

(b) To examine all books, contracts, records, documents and papers and to compel their production. (Sec. 45.)

(c) To conduct hearings and to take testimony on any proposed change of law relating to any common carrier, if requested to do so by the legislature, by the senate, or assembly committee on railroads or by the governor. (Sec. 45.)

(d) To prescribe the form of annual reports. (Sec. 46.)

(e) To investigate accidents—such as in the judgment of the commission require investigation; and immediate notice to the commission of all accidents is prescribed—the law requiring the office of the commission to be kept open from 8 a. m. to 11 p. m. (Sec. 47.)

(f) To investigate as to any act done or omitted to be done by the common carrier

in violation of any provision of law or in violation of any order of the commission. (Sec. 48.)

(g) To fix rates and service. (Sec. 49.)

(h) To order "repairs or improvements to or changes in any tracks, switches, terminals \* \* \* motive power, or any other property or device \* \* \* in order to secure adequate service." (Sec. 50.)

(j) To order changes in time schedules by an increase in the number of trains, or cars or motive power, or by changes in the time for starting its trains or cars. (Sec. 51.)

(k) To establish a uniform system of accounts, and prescribe the manner in which such accounts shall be kept. (Sec. 52.)

9. The approval of the commission is necessary in various cases:

(a) No construction of a railroad or street railroad or any extension of existing lines shall be begun without such approval. (Sec. 53.)

(b) No franchise nor any right to or under any franchise, to own or operate a railroad or street railroad shall be assigned, transferred or leased

without the approval of the commission. (Sec. 54.)

(c) No railroad or street railroad or other stock corporation shall purchase, acquire, take or hold any part of the capital stock of any other road without the approval of the Commission. (Sec. 54.)

10. No stocks, bonds, notes or other evidences of indebtedness (except notes payable within twelve months) shall be issued without an order from the commission authorizing such issue, stating that in the opinion of the commission the use of the capital to be secured by such issue, is reasonably required for the

acquisition of property, the construction, completion, extension, or the improvements of its facilities, or for the improvement or maintenance of its service or for the discharge or lawful refunding of its obligations.

But it is expressly provided

that the commission shall have no power to authorize the capitalization of any franchise or the right to own, operate or enjoy any franchise whatever in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to a political sub-division thereof as the consideration for the grant of such franchise or right.

A merger or consolidation of existing companies is not forbidden; but the law provides that

the capital stock of a corporation formed by the merger or consolidation of two or more other corporations (shall not) exceed the sum of the capital stock of the corporations so consolidated, at the par value thereof, or such sum or any additional sum actually paid in cash; nor shall any corporation hereafter issue any bonds against or as a lien upon any contract for consolidation or merger. (Sec. 55.)

11. The penalties for failure to comply with an order of the commission are drastic. Every day's violation constitutes a separate and distinct offense and for each offense the offender incurs a penalty of \$5000 if he be a common carrier, or \$1000 if he be a corporation

other than a common carrier. Every individual who procures, aids or abets any violation or who fails

to obey, observe and comply with any order of the commission or any provision of the commission, or who procures, aids or abets any such common carrier or corporation in its failure to obey, observe and comply with any such order or provision, shall be guilty of a misdemeanor. (Sects. 56-58.)

12. In case the commission shall be of opinion that a common carrier by action or failure to act is violating the law or an order of the commission, it shall direct counsel to commence an action to secure relief by way of mandamus or injunction; and the court shall require an answer within twenty days. (Sec. 57.)

13. Article four applies practically similar provisions to the gas and electrical companies of the State. It also provides for inspection of all gas and electric meters. (Sec. 67.) The commission has the right to fix rates upon proper complaints as to quality or price, not only that supplied by private persons and corporations, but by municipal lighting plants as well; it has the power to examine the books and the affairs of the producers, to approve of all incorporation and franchises, and of all stocks, bonds, and other indebtedness; in short the aim of this article is similar to the preceding, although having been drafted with less success it is in places somewhat obscure. It is to be hoped that amendments to the law will soon remedy these defects.

14. With the abolition of the former railroad, gas and electricity, and New York City rapid transit commissions, and the inspectors of gas meters the bill ends with the necessary provisions for the transfer of records, the continuance of pending actions and proceedings and the necessary appropriations.

To call this law a piece of radical legislation is to speak mildly. It seems to mark an epoch in the history of our State, for the corporations affected by the drastic provisions of the law are among those upon which the whole structure of our present business system rests. Without the railroads modern commerce would be impossible; without the street railroads our cities could not spread their vast populations out into their evergrowing suburbs and social conditions would be completely altered; gas and electricity are not merely essential to our comfort, they are necessary to the existing business order—all of these public utilities are vital elements in the lives of every one of us, and a law which compels such a complete readjustment of their rela-

tions to the State on the one side and the public on the other is not merely radical, it is revolutionary.

### III

With many people the bare suggestion that the State or a municipality should undertake to regulate any business hitherto in private hands is at once denounced as "socialism." I must confess to having only the vaguest notion of what "socialism" in an economic sense is, but judging from the current use of the term it means anything which you want the State to do that I don't want it to do. It has been urged against the public service commissions law that it is "socialism," perhaps it is, but the people are not going to be frightened by a mere word. The exact point where private action may best end, and the community itself should take hold, has certainly not been discovered yet; nor is it likely ever to be settled, for social conditions shift quite as rapidly as social experiments are made; and where can we draw the dividing line?

Some lawyers will tell us that there is no dividing line in this particular matter—that there is no essential difference between a public service corporation and any other; and that it is simply a question of public policy as to what business the State shall undertake to regulate, and what it shall leave without interference. Others will say that however hard it is to draw a dividing line, yet there is certain territory which is quite obviously on one side of the line, wherever the line may be, and certain territory quite as obviously on the other. Also it seems to be true that a certain business may stand on one side of the line in one generation and occupy the other side in the next. For many centuries it was public policy to subject the inn-keeper to stringent regulation in the public interest, but with the growth of modern conditions it has ceased to be necessary, and a modern hotel company can hardly be considered as a public service corporation. On the other hand when a virtual monopoly in the supply of some necessity of life has come into existence, that business certainly is drifting over the line into territory where some sort of public regulation seems inevitable.

Competition was formerly recognized as the essential basis of trade, and so naturally, in the matter of modern public utilities, it was at first assumed that the safeguard of the public would be competition. Therefore, legislatures chartered rival railroads, and common councils

granted franchises to rival trolley, gas and electric companies; only to find that almost inevitably, after a brief period of cut-throat competition, which threatened failure to both sides, there was consolidation, overcapitalization and relatively, if not actually, higher charges—and thus for the poor consumer the last state was worse than the first.

In New York we have at last waked up to the fact that in these public utilities there has not only never been any genuine open competition, but from the nature of the case there could not be. We are also learning that in these businesses especially, if justice is to be done to the buyer as well as to the seller, in place of competition something must be substituted; and that something we are now to try in the shape of State regulation.

All the businesses which are placed under the jurisdiction and supervision of the New York public service commissions are all more or less monopolies dependent upon some form of public grant or franchise. Our railways are not only great modern public highways, but the companies that own them also own the means of traversing them and of transporting goods along them.

Our street railways occupy the public thoroughfares under exclusive grants from municipalities. The gas companies must get permission from the city to dig up the public streets, and electric light companies to erect their poles. Express, freight line and sleeping car companies only supplement the work of the railway. One and all would be unable to exist except for the public grant which is their foundation; and all these come well within the territory of public service corporations, which should be subject to State regulation.

The reasoning under the old theory of the relation of the State or municipality to its public utilities was something like this (let us take a gas company for instance):

1. The people of the city need gas.
2. Here is a company of investors willing to spend the money necessary to supply the people with gas.
3. To establish its business the company needs a franchise to lay pipes along the public streets.
4. The city can well afford to permit the use of the public streets for the benefit of the gas consumers; especially as the gas company promises to light the city streets at a reasonable rate.
5. By such use of its streets the city loses nothing; for the people get their supply of gas and the city gets its streets lighted.

6. The gas company is entitled to make all the money it can out of the private consumer. So long as the price of gas to the city is reasonable, the private consumer must take care of himself; if he does not like gas at the company's price he can go back to lamps and candles.

This was ingenious reasoning but its fallacy is now getting to be quite obvious; it is not true that the gas company has a right to make all it can out of the private consumers; for whenever the company pays upon the money actually invested a higher return than is just and reasonable—making of course a liberal allowance for the risk of new enterprise and whatever is necessary as incentive for good management; whenever for instance over and above such just and reasonable returns the gas company declares stock dividends from its surplus, or when it issues stock which is not based upon actual capital invested, it is in reality capitalizing for the benefit of its stockholders property which belongs to the city; which belongs to the city in spite of the fact that the common council may have granted that franchise in perpetuity to the gas company. For when the city legislature grants a franchise in perpetuity it gives away what does not belong to it to give, what does not even belong to the public—the existing generation of citizens—but which belongs to the whole community of today, of tomorrow and so on to the end of time.

The fundamental mistake we have been making in all these years it is now easy to see—we have not realized the essential nature of the franchise—nor the essential difference between the ownership of a private business, subject to competition, and the operation of a public utility under a monopoly. Our ordinary American citizen, intent upon his own business and satisfied if he was making it pay, was also satisfied if he was getting from railroad, express company, telegraph or telephone the service that his own particular business required; and he was little inclined to question the right of investors, who were bringing to him the business advantage of a very necessary public service, to do what he himself was doing—make as much money as possible on the investment.

The old theory, therefore, was that railroad or gas company, under a minimum of public supervision should be managed like private business corporations, primarily, if not exclusively, for the financial benefit of the investors. To be sure, under the fostering care of the older generation of railroad manipulators, that theory received some rather severe shocks, and we realized that the investors frequently

failed to get their shares of the profits; nevertheless, whatever the practice, the theory was still held to be sound. But of recent years our ideas have changed, as we have seen railroads utilized by monopolies to fasten their hold upon the public and crush out competition with remorseless vigor; as we have seen valuable city franchises secured for favored individuals frequently by methods utterly abhorrent both in law and morals; as we have come to realize the power which lay in the hands of railroad companies to stimulate artificially one community while it might destroy another; as the knowledge has been slowly burned into our consciousness that public service corporations were after all managed by men very human in their weaknesses, greedy for power and wealth, and no more successful in resisting temptation than the rest of mankind. Studying these corporations more closely we have seen the newer companies—railroads, interurban electric roads and lighting companies, being managed primarily if not exclusively for the benefit, not of the investors, but of those who could induce investors to invest. A new form of human pest has thus made his appearance—the Promoter: and a new science of banking has made its appearance, which I think has not been named yet. "New" did I say? To some of us these new friends look most uncommonly like our old acquaintances, Dick Turpin and Jack Shepard, in a fresh disguise; and the new banking has a most unseemly resemblance to the old amusement known as highway robbery. Wordsworth's Rob Roy was not the first to invent that

Good old rule—the simple plan—  
That he shall take who has the power,  
And he shall keep who can.

nor has he been the last.

In this latest variation of the old game the interests of the investor and the interests of the public alike have been overlooked; but it is all a very logical outcome of the original mistake—the theory that a public utility, once its franchise is granted by State or municipality, becomes a mere matter of private business.

The fundamental purpose, as I understand it, of the public service commissions law is to remedy that old mistake—to place the relations of the State, the public service corporations and the public once for all upon an open and honest footing, one fair to all parties. All three parties are parties in interest; the public, the community of today demanding fair treatment for every individual, large manu-

facturer or small, rich or poor alike; the public service corporation, demanding just and liberal treatment for those who are willing to invest their capital in developing a public utility; and the State, standing for the whole community in its continuing capacity from generation to generation—from now into the far distant future, and demanding that these great questions shall be considered not as of today—but that the decision in all matters of public policy shall take the road which leads often away from the best immediate results toward the best results for the time to come. And of these interests the last is by no means the least important.

"Conscience and the present constitution of things," says Davison, "are not corresponding terms. It is conscience and the issue of things which go together."

A public service corporation is thus in reality a tri-partite partnership in which the past, the present and the future are all joined—the investor seeking security and a just return for his capital, the result of the labors and sacrifices of the past; the public asking immediate service in the present; and the State demanding consideration for the future.

It is the duty of the public service commissions to consider every question brought before them in the light of these interests and to attempt to do justice to all three—to make use of the results of the past—to satisfy the just demands of the present, and to keep ever in mind the needs of the future. It is because of its endeavor to restore a proper balance to these three interests that this law makes so great a step in advance.

We have been told that while the law gives the commissions power over future issues of stock and provides expressly that no franchise shall hereafter be capitalized, the commission should not attempt to reopen old matters—must not touch existing securities; that vested rights have been gained by the granting of franchises; that where such franchises have been capitalized they must be held inviolate; and that rates must be fixed with due regard to those vested rights. I should answer to this that a common council or a State legislature may barter away any present rights, yours or mine; but the future is not theirs to give. They may not dispose of rights which belong to our children as much as to us, and to their children and their children's children after them. They may allow private development and management for the sake of immediate public

advantage, and any such investment should be protected from unjust and unreasonable competition and must be held sacred for the investors; but the franchise itself is something which may not be given away because it is not within the province of the legislature to give away that which does not belong to the *existing* community. A franchise granted by the legislature of fifty years ago, for instance, belonged then to us of today quite as much if not more than to our grandfathers who handed it over to some railroad in perpetuity; it belongs to us now as it will belong to our grandchildren in their turn. The action of the legislature of two generations ago in giving away our birthright is not morally a binding contract upon us to-day, when it comes into conflict with present or future public interest; and the vested rights of the private inheritors of that franchise will not stand when they come into conflict with the vested rights of the whole people of the State of New York.

Perhaps this blunt statement may seem "socialistic" and not to be accepted by those who fear to face plainly the conclusions which must be drawn from the premises they have helped to create; they will say that contracts are sacred by the Constitution and the laws and that therefore these old franchises must stand. But the Constitution will not guarantee a contract which was essentially illegal in its inception, any more than it will protect a sale of stolen goods however innocent the seller and the purchaser; and while this view of the illegality of the old franchise contract may not be "good law" according to present decisions, it will be good law within a very short time; for the public perception of the inner essence of things has grown with surprising swiftness of late years, and the courts never lag very far behind public opinion. If it is not legally practicable actually to take back the franchises there are other ways of reaching the same practical result which will be found and developed. The law will never stand in the way of genuine progress; some legal way will always, sooner or later, be found to do that which is morally right and which the voice of the people, when it is the voice of God, demands.

The continuing community then is the real owner of the franchise, and as such is entitled to its share of the profits of the public service corporation; and that share amounts to all that is left after the legitimate investor has had a liberal return on his investment, with something over to stimulate good business management. And that share should be given to the public and the State either in the shape of direct payment for the franchise, in improved service or in lower rates.

## IV

A few words in closing as to the practical operation of the law in New York. The commissions have been in existence only a year and that is a short time for a revolution to be consummated; but already experience has shown the immense value of the law. Merchants and manufacturers have a powerful tribunal before which they can plead for justice and efficiency; any individual with a just complaint can have it brought to the attention of a public service corporation by the commissions far more forcibly than he himself could bring it; the issues of stocks and bonds by these corporations are for the first time subjected to rigid scrutiny, and it is safe to say that very little water will leak into such securities in the future; in every way the rights and interests of the public are being safeguarded as never before, and the public is becoming aware of the fact. For the first time in their history these great corporations realize fully that there is a higher power above them—a power to which the public can now appeal; they have been shorn of their ability to dispense life or death to businesses, to tyrannize over individuals or to ignore the interests of the public—for above them is the State, demanding justice and fair treatment for its citizens and enabled to enforce its demands.

It is only fair to say that on the other hand the corporations have shown both good sense and good temper in accepting the law graciously, and doing all in their power thus far, in carrying out its provisions and the orders and requests of the commission. Hundreds of complaints never reach the commissioners; the complaints are remedied by the corporations as soon as their attention is called to them. In truth, the wiser among the corporations managers see plainly that the law is their best defense against dangerous legislation; that the commission will stand as a barrier against injustice to the corporations on the one hand while it affords relief to the public against injustice on the other.

It will lead to a safer and better condition of things all around—the public will see that its rights are safe-guarded and demagogic appeals will lose their force and effectiveness; the corporations will be protected against destructive competition and blackmail, and assured of a fair return on honest investment; hence should result a return of public confidence in the securities of the corporations—which ought in turn to be as good and conservative investments as

any municipal bonds. There will be two classes of people, but I think only two, who will suffer from the law—those among the capitalists and promoters who are too greedy to be content with their fair share—who wish to reap where they have not sown; and the demagogues and agitators who will feel themselves cheated out of their best weapons of attack. But if both these classes could be put out of business entirely the public would become duly grateful.

That all these desirable things will come at once no one will expect; that they are coming and that the public service commissions law will justify the expectations of its promoter many of us fervently hope and believe. That act is upon the statute book not because a governor of New York wished to alter the law; but because public opinion justly demanded a change in existing conditions. The old footing of the public service corporations was intolerable; something new had to be substituted for the false and outworn theory of competition in order to protect the public and the State. Governor Hughes recognized the voice of the people demanding reform and the result was an effective piece of legislation which fairly entitles its author to be considered as that rather rare personality in American politics—a constructive statesman.

For my own part, as a democrat I welcome a law which seems to me not only essentially democratic in principle, but as in line with frequent declarations of the party policy—an effort to root out the most insidious forms of special privilege and to regulate in the names of the people various monopolies which have been for many years disturbing factors in our social and political development.

## PUBLIC SERVICE COMMISSIONS

BY WILLIAM H. HATTON

*Ex-State Senator, New London, Wis.*

The subject under consideration is so large that it is not possible to do more within the time allowed than to call attention to a few points, and as it is desirable at a meeting of this kind to promote discussion, we will, after making a brief general statement, notwithstanding it presents the subject in a disconnected way, take up for consideration a few of the points relating to the details of public regulation about which students of the problem differ, viz: Valuation of public utility property, uniform accounting and publicity, franchises, State regulations and home rule, rates and classification, and court review.

One of the chief functions of the State is to provide such public utilities as are necessary for the economic and social welfare of the people.

The State has undertaken to furnish these by authorizing various corporations to engage in public service enterprises. Corporations having engaged in the work, cannot escape the responsibility attaching thereto. They are under obligations to furnish to all persons, without discrimination, adequate facilities and service at reasonable rates.

The right of the State to control and regulate all corporations of its own creation and to prescribe the conditions under which foreign corporations may operate within the State is original and inherent, but aside from this right of corporate control is the right of the State to control all persons engaged in a public calling and all property which has, by reason of its use, become invested with a public interest. This is no new theory or doctrine, but it is nearly as old as the common law. The control of railways, which are but modern highways, is of the highest importance at the present time, is increasing and will continue to increase in relative importance from year to year, due to many different causes, among which are increasing intelligence and wealth resulting in a higher standard of living, the increas-

ing specialization of labor, which requires increased facilities to bring together the specialist and the raw material at the specially equipped factory.

The enormous relative increase in manufacturing: 1890, value of manufactured products according to census was in round numbers about \$9,000,000,000; 1900, about \$13,000,000,000, a gain of about 40 per cent in ten years, and the percentage of gain since that time is much larger.

The concentration of manufacturing in the large factories tends to increased urban population, all of which increases the relative importance of transportation facilities. The transportation of passengers and freight has increased at a rate far in excess of the increase in population.

From 1895 to 1906 track mileage of railways increased 24 per cent, gross earnings, 115, net earnings, 124, while the population increased only about 25 per cent.

It requires deep study and careful consideration of social and economic relations in order to appreciate the tremendous influence of public utilities and the power of the utility corporations. The value of every piece of property is affected by transportation facilities and charges. He who controls the highways and transportation facilities, controls the wealth and prosperity. A vast power is in his hands, a power so great that he who wields it uncontrolled, may control the nation.

There has been for some years, as shown by census reports, a very marked relative increase in urban population. This, together with increased intelligence and wealth, increases the demand for all kinds of urban and interurban public utilities. The increasing intelligence and enterprise of the rural population brings the telephone and the telegraph into increased use—thus the relative importance of all public service utilities increases from year to year with the growth of civilization and the complexity of modern life.

Another matter which may be considered in connection with this subject, is the fact that there is an ever-increasing demand for abstract wealth, stocks, bonds, mortgages, etc., a form of wealth which in a measure relieves the owners from the care and responsibility of tangible property, but nevertheless gives them power to exact an income therefrom. A large portion of this abstract wealth is in public utility securities.

The policy pursued in the past has enabled the promoter, the infla-

tionist and the speculator to water, inflate and manipulate these securities, and in order to make them marketable, the owners have required the public to pay an excessive amount for service rendered to insure interest and dividends on watered stock, or at least to show prospect of dividends. The demand for abstract wealth has been such as to furnish a market for these securities, but they have been so manipulated that only the wealthy, who can employ experts and attorneys to investigate, have been safe in investing in them. Therefore the result is that a large proportion of the better class of such securities have passed into the hands of the excessively wealthy, or the idle rich, to whom such securities are attractive on account of the desire to escape the responsibility of wealth and still enjoy the income therefrom, a system which is comparable to absentee landlordism, and tending to class distinction. This class of property should be so guarded and controlled that the present manifest greed of some of the owners may not wring from the workers an unjust tribute for the benefit of the idlers.

With the proper control and regulation, all of these public utility securities can be made reasonably stable and safe, which will tend toward local ownership of these various utilities by the wage earner and small investor, people who are more directly interested in them, a condition very much to be desired.

The necessity for efficient public regulation is evident.

The right of the State to control is clear, but on account of the various and varying conditions under which public service enterprises exist, and are operated, it is not practicable for the legislature, owing to its large membership, its organization and procedure, designed for general legislation, rather than administration, to deal with them except in a general way. Therefore, if we are to have effective public regulation, the legislature must intrust the details to some smaller and differently organized tribunal.

Whenever an attempt has been made to confer this regulating power on the judiciary, the courts have held the act to be unconstitutional, and have declared it to be an exclusive legislative, or administrative function which may be exercised through a commission. The courts have defined the law and pointed out a practicable method of exercising the power of the State.

The commissions have been established. They stand on clear legal ground. They occupy a legitimate field.

No person need offer any apology for the existence of a well-ordered

commission. The apology is due from those who have neglected to provide some effective method for exercising the States' power to the end that justice may prevail.

The economic and social necessity for such a tribunal is sufficient to justify its existence. The importance of the work intrusted to it is only equaled by that of the judiciary. Not only the financial, but the social well being of the people is involved in the question of the proper control and regulation of public service corporations.

#### COMMISSION

Much depends on the personnel of the commission. So important is the work intrusted to it that it requires men of high character and broad training. It would be folly to allow partisan or personal influences to govern in the selection of the commissioners. They should be, as our judges are, beyond the control of partisans or the influence of petty political strife. Honest, broad-minded men, influenced only by the highest motives, seeking only an equitable adjustment of the relations between the public and the corporations. We must not, however, overlook the fact that weak, inefficient or corrupt men may by chance or design secure a place on the commission. Therefore, the commission should be subject to wise and discreet checks and balances so important in representative government. The law itself must be so sound, having such inherent force and such efficient executive machinery that the work of the commission like the work of our government, will go on, and the will of the people will be carried out even though at times the guiding hands are weak. Otherwise the delegation of authority may be the means of defeating the will of the people rather than enforcing it.

#### VALUATION

As a foundation for its work and that the commission may proceed intelligently and within its legal powers, it must know the value of the property of any public utility corporation, the acts of which are under consideration, for the courts have held that, in fixing rates due consideration must be given to the public rights, to the value of services rendered and to the value of the property devoted to public use. Therefore, it may readily be seen that the commission should be required to ascertain the value, and full authority must be conferred upon it to secure from whatever source obtainable

all the necessary information to enable it to arrive at the true value of each public utility plant.

The actual investment, the true physical value ascertained by competent engineers and experts employed by the commission, is the true basis for valuation. It should not, however, be understood that this is the only element to be considered, for the commission should take into consideration every element that in any way affects the value of the property considered as any operating unit, but that the commission, the courts and the public may be enabled to pass judgment intelligently upon any matter relating to any public utility, it is absolutely necessary that the actual physical value be ascertained and made known.

If it is conceded that the nature of the business of public service corporations is monopolistic, and that each corporation is to be protected in its investment by granting it a monopoly in its field, and the opportunity to continue indefinitely, then all of the elements which enter into the valuation of the property of competitive business enterprises, including franchises, goodwill, etc. (which have furnished such fruitful field for the operations of the promoter, the inflationist and the stock speculator) will be affected and some of these elements will be eliminated.

Too much emphasis cannot be placed upon the matter of valuation and especially the physical valuation, for this is essential, if we are to protect the public from excessive charges which may be made through the compulsory power of the corporation having a monopoly of the field, as well as to protect the utility corporation in the matter of returns on its investment, a protection to which the courts have held it to be entitled.

Do not misunderstand this statement relating to returns on investment. Many hold to the theory that the corporation is entitled to charge sufficient to pay all operating expenses, interest, and other fixed charges and dividends on stock under all circumstances.

Those who take this view evidently have not fully considered what the courts have said on the subject, for the United States supreme court holds that each case must be considered on its merits, and due consideration must be given to the value of the services rendered, and that the rate must be just to both the public and the corporation.

In 169 U. S., 446, the court said:

It cannot therefore be admitted that a railroad corporation maintaining a highway under the authority of the State may fix its rates

with a view solely to its own interest and ignore the rights of the public.

But the rights of the public would be ignored if rates for transportation of persons, or property on a railroad are exacted without reference to the fair value of the property used for the public or the fair value of the services rendered, but in order simply that the corporation may meet operating expenses, pay the interest on obligations, and declare dividends to stockholders.

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What the company is entitled to ask is a fair return upon the value of that which it employs for public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the service rendered by it are reasonably worth.

#### PUBLICITY AND UNIFORM ACCOUNTING

That the commission may have a comprehensive and thorough understanding of the business of the different utility enterprises, over which it has jurisdiction, it is necessary that there be adopted by all utility corporations a scientific system of accounting, prepared by experts and approved by the commission, uniform in each class, and all public utility corporations should be required to adopt and use such uniform system and be prohibited from keeping any other books than the regular public books approved by the commission.

The form of accounts is a matter of detail, but two important features should be embodied in any system that is adopted; that is, accounts should be kept in such a way that the books will show the various items of cost per unit of product; and a depreciation fund account must be kept reasonably adjusted to its earnings, and depreciation beyond the amount actually paid for renewals and maintenance be charged off from capital.

The people have a right to know all the facts relating to the finances of any and all public utility enterprises, and a satisfactory solution of the problem will never be reached until this is conceded and provided for. A complete scientifically arranged, uniform in each class, system of reports prepared under the direction of the commission, showing in detail all financial matters which in any way affect or pertain to investment and operation, should be filed with the commission. The reports of all utility enterprises, whether operated by municipalities or private corporations, should show in detail the various items of cost per unit, such as a thousand feet of gas or kilo-watt of electricity.

Comparative statistical statements prepared by the commission and published in its annual report will enable the managers, whether under private or public ownership, to make comparisons that will reveal the defects in management. Under this method, each manager is measured by the most efficient as the standard.

Publicity of this kind will enable the public intelligently to pass judgment on the relative economic efficiency of private ownership and management and municipal ownership and management.

When the people have all the facts and know the truth, they will not be unreasonable in their demands.

#### FRANCHISES

In order to attract capital and enlist it in public utility enterprises at minimum rates of interest and dividends, it is necessary to offer security and opportunity for permanent investment. Therefore, investments in these enterprises should be made as stable and secure as is consistent with the public interest.

Without effective public regulation, through a competent commission to which the people can appeal for relief from any unreasonable demands of public utility corporations exercising a monopoly privilege, public authorities, in order to protect the public, deem it necessary to fix a date on which franchises will expire, after which a readjustment of the relations between the public and the utility corporation may be made. The time limit in franchises introduces an unnecessary element of uncertainty into public utility enterprises, which has the effect of increasing the price the patrons are required to pay for service beyond that which can be secured if the time limit is eliminated, and there be granted indeterminate franchises, that is, a franchise which grants the utility corporation the right to continue so long as it shall furnish suitable and adequate facilities and service at reasonable rates in the territory over which its rights extend, or until such time as the municipality shall elect to exercise its option to purchase. Every franchise should reserve an option to the municipality to purchase the utility plant.

Indeterminate franchises will tend to keep the utility corporations out of politics and will go far toward relieving them from corrupt political influences, and will obviate the necessity of a sinking fund to retire existing bonds within the franchise limit, and will prevent returning to the stockholders their capital through the depreciation fund instead of using it as it should be used for maintenance.

It may readily be seen that a limited franchise may afford the utility corporation some ground for the claim frequently made that it has a right to charge sufficient for service to pay dividends and return to bondholders and stockholders the capital invested, while the corporation still owns the utility plant. Under an indeterminate franchise the only legal depreciation charge that can be made is the amount necessary to cover actual depreciation.

It requires very careful adjustment to insure an equitable division of the returns from public service enterprises, taking into consideration the stockholders, the employees and the patrons, that the artisan, the scientist and the manager may be stimulated to the highest possible efficiency and the goodwill and coöperation of the public secured.

All franchises should provide for some system of profit sharing, example of which the "sliding scale," which permits increased dividends when price of product is decreased. Another more equitable plan is to provide for the distribution of any surplus funds on an agreed percentage to stockholders, employees and patrons, or in lieu of specifying any definite plan the franchise may provide that any equitable plan which the commission will approve may be adopted.

With public regulation through a competent tribunal with power to adjust all disputes and with authority to adjust rates so they shall harmonize with changed conditions, there is no good reason for fixing a time limit in public utility franchises.

#### STATE REGULATION AND HOME RULE

While the State has the power to absolutely control all public service corporations, it is well to bear in mind that local municipal government, in so far as practicable, is the true policy to pursue, and wise State supervision, when dealing with public utilities situated within the corporate limits of cities, will emphasize this principle rather than ignore or override it. The initiative in all local public utility matters should remain with the local authorities. The right to review and regulate should be assumed and exercised by the State.

There is an intermediate field between absolute control and dictation by the State and absolute municipal control and dictation by the city council. This intermediate field is the proper sphere for the activities of the State commission in regulating the public service utilities situated wholly within the limits of cities. The commission will then occupy the position of a disinterested tribunal rendering

expert service, doing that which is not practicable for the local authorities to do, such as valuation of plant, uniform accounting, reviewing and acting as arbitrators in matter of rates and in all other disputed matters arising between the municipalities and the public service corporations.

Thus the commission becomes an efficient aid to local control. It enlists active public interest through publicity, thus bringing to bear upon the subject the powerful controlling influence of intelligent public opinion. It renders assistance to local authorities by furnishing reliable data for use in dealing with the utility corporations direct, or in legal contest with it in the courts.

Prof. John H. Gray, a recognized authority on such subjects has said:

We cannot discuss, for want of suitable data, the economic problems connected with gas supply. We lack, completely, data for a discussion of the question now talked about so much, namely, public ownership.

Prof. Frank J. Goodnow of Columbia University, says:

The development of any science of municipal administration is rendered practically impossible because of the absence of all reliable data.

#### RATE REGULATION

While there is no way of measuring it, there is no doubt but that the existence of a commission with power to review and fix rates has a very powerful restraining influence on the agents of the utility corporation when making the rates in the first instance.

To secure effective regulation the commission must have power to review on complaint or on its own motion any existing rates, practices or service, and after due notice and hearing, fix reasonable rates which shall be substituted for those found to be unreasonable, and to have like power over practices and service.

The commission shall make definite rates, not maximum rates, which shall be in force as soon as legally published. Those who question the right of the State to confer on a commission the right to fix definite rates have evidently overlooked the fact that the power of the corporation to fix rates rests on the authority conferred upon it by the legislature.

The likelihood of a commission composed of men not only learned in the law relating to utility corporations but of men who are making a

special study of the question, and have no personal interest in the matter at issue, as the men making the rates in the first instance had, fixing an unjust rate is very remote, and as orders of the commission are subject to court review, all interests are amply protected.

#### CLASSIFICATION

The importance of freight classification must not be overlooked. The commission must have power to regulate classification, or the rate making power will not be effective.

#### HEARINGS AND COURT REVIEW

At a hearing before the commission both the complainant and the corporation shall be given full opportunity to offer testimony of every kind relating to the matter at issue.

After any such hearing, if the commission shall find the rate complained of to be unreasonable, immediate relief shall be given and the commission shall fix a reasonable rate to be substituted for the rate found to be unreasonable. The new rate must be submitted to and observed until passed on by the courts and thereafter unless it shall be declared by the court to be unlawful, as the rate made by the corporation was submitted to and observed until it was declared by the commission to be unreasonable.

It would be an injustice to the complainant as well as others who are required to pay the unreasonable rate to allow the matter to be taken to the courts upon appeal to be tried *de novo* and allow the old rate, which has been declared to be unreasonable, to remain in force, pending judicial determination.

To try the case anew in the courts, the old rate remaining in force meanwhile, and keep the complaint entangled in litigation, would not only be unjust to him, but would delay the equitable adjustment of rates by deterring others from making complaint, for the majority will submit to wrongs rather than engage in lengthy litigation with wealthy corporations.

To those who advocate this judicial procedure, we commend the words of Chief Justice Ryan, found in his opinion in the railroad cases. In the 35th Wisconsin, he said:

Their influence is so large, their capacity for resistance so formidable, their powers of oppression so various, that few private persons could litigate with them, still fewer persons would litigate with them for the

little rights or the little wrongs which go so far to make up the measure of the average prosperity of life.

The complainant having won his case before the commission, he should be relieved from further litigation and thereafter the State must defend the acts of the commission for it is a matter of public concern. Therefore let any party in interest who is dissatisfied with any order of the commission bring an action in any court of competent jurisdiction against the commission as defendant to set aside any order made by it, fixing any rate, on the ground that the rate made by the commission is unlawful.

In trials before the courts, if there is offered any new material evidence or any different evidence than that offered at the hearing before the commission, the court shall stay its proceedings for fifteen days and remand the case to the commission for rehearing. This procedure prevents the withholding of material evidence at the hearing before the commission for the purpose of introducing it at the court trial, thereby securing a reversal of the order and thus discrediting the commission, and it compels the submission of all testimony to the commission for consideration before its final action.

At the hearing before the commission the question passed on is the rate made by the utility corporation, and the burden of proof is then upon the complainant, he being the plaintiff, to show by preponderance of evidence that the rate complained of is unreasonable; if he succeeds in so doing, then in a court trial, in an action brought by the utility corporation, the question will be on the rate made by the commission and the burden of proof will then rest upon the utility corporation, it being the plaintiff, to show by a preponderance of evidence that the rate made by the commission is unlawful.

#### INTERSTATE COMMERCE

The interstate commerce commission has jurisdiction over railway corporations with a capitalization of more than \$12,000,-000,000 based on various relative values. These corporations operate more than 220,000 miles of railways extending over a vast area of varying topography, from rich valleys and fair plains to barren mountains, covering a wide range of climate, industry and character and density of population. Considering these we can realize the magnitude of the task before it. In order to secure more prompt consideration of interstate transportation questions which arise, it may be found necessary and desirable to subdivide the territory creating federal commerce districts after the manner of federal judicial districts.

## THE PUBLIC SERVICE COMMISSION LAW OF WISCONSIN

BY HON. GEORGE B. HUDNALL

*State Senator, Superior, Wis.*

I am happy to say that we did not need the stimulus of a Jay Gould, a Vanderbilt or a Whitney to enact a public utility law in Wisconsin. There were, however, conditions existing in Wisconsin which justified the enactment of that law, and it may be interesting to notice briefly what those conditions were.

Prior to 1903, the railroads had been paying, in lieu of taxes, a percentage on their gross earnings. Through various political campaigns and before the legislature, there had been agitation for the taxation of railroads on an ad valorem basis. In 1903 such an act was passed. It was claimed at the time that the railroads intended shifting the added tax to the shipper, by increasing the freight rates. Governor LaFollette sent a special message to the legislature of 1903, in addition to his general message, strongly advocating the creation of a railroad commission for the purpose, among others, of preventing the shifting of this added burden of taxation from the railroads to the public. Such a bill was then pending in the assembly but was defeated.

In 1904 the republican party adopted a platform favoring a railroad commission with power to regulate freight and passenger rates. A campaign was made throughout the State—in every assembly and senatorial district—favoring the enactment of such a law, and every member of the legislature was elected upon the direct issue of whether we were or were not to have a railroad commission.

When the legislature met in 1905, a bill was drafted by the senate committee on railroads which was finally enacted into law, creating a railroad commission consisting of three members, to be appointed by the governor, by and with the advice and consent of the senate, and subject to removal by the governor for cause. When one reads the Wisconsin act and the law subsequently passed in New York, he cannot fail to recognize the relation of parent and child between the two.

Our commissioners receive a smaller salary than those in New York, ours receiving an annual salary of \$5000 each, while the salary in New York is \$15,000 per annum for each commissioner. We have succeeded in getting a first-class commission, as good, I believe, as any in the world. It is my opinion that our salaries are ample. In the east, living conditions are different, salaries are higher, which, with other conditions, probably justifies the difference in salaries in the two States.

The Wisconsin act of 1905 gave the commission jurisdiction over railroad corporations, express companies, car companies, sleeping car companies, freight and freight line companies, and interurban street railroad companies. In 1907, under the administration of Governor Davidson, there were added to the jurisdiction of the commission, telephone, telegraph, gas, electric light, water and power companies, and also urban street car companies.

The Wisconsin commission, therefore, has jurisdiction over more utilities than has the New York commission. As the New York commissioner, Mr. Osborne, has said, their commission has no control at this time over telephone and telegraph companies; neither has it control over water companies.

The control over railroads by the New York commission is similar to ours in many respects. We have, however, several features which they have not, some fundamental, others possibly not. Our control over gas and electric companies is much stronger than New York. I will endeavor, briefly, to indicate the differences in the two laws.

The Wisconsin act provides for a valuation by the commission of *all* utilities; the New York law does not provide for any valuation. To my mind, it is highly essential in determining a rate, to ascertain first the value of the utility. The commission cannot make a rate so low that the utility cannot receive a return of at least legal interest (6 per cent) upon the value of the utility. It is necessary, therefore, in order to determine intelligently what rate should be made, to determine first the value of the utility. Under the act of 1907, the commission is to value only such property of the utility as is "actually used and useful for the convenience of the public." If a utility has some property which is not actually used and useful for the convenience of the public, it should not receive a return upon its value, and under the act of 1907, the commission, in making a valuation, would not value that piece of property.

In Wisconsin a uniform system of accounting is mandatory; in

New York it is permissive. In Wisconsin it is "shall;" in New York it is "may."

In addition to a mandatory uniform system of accounting, the Wisconsin act of 1907 provides that the utility shall keep no other books on account than those prescribed or provided by the commission. There was very strenuous opposition to this feature of the law before the legislature. That act also provides that the commission shall audit the books of all utilities; that the utility shall render an annual balance sheet to the commission, and, when the commission so requires, the utility shall keep an adequate depreciation account. The commission shall also keep itself informed of all new construction, extensions and additions to the property of the public utility. The reports the utilities must furnish to the commission must show in itemized detail

the depreciation per unit, the salaries and wages separately per unit, legal expenses per unit, taxes and rentals separately per unit, the receipt from residuals, by-products, services or other sales separately per unit, the total and net cost per unit, the gross and net profit per unit, the dividends and interest per unit, surplus or reserve per unit, the prices per unit paid by consumers, and, in addition, such other items, whether of a nature similar to those hereinbefore enumerated or otherwise, as the commission may prescribe, in order to show completely and in detail the entire operation of the public utility in furnishing the unit of its product or service to the public.

These accounts and reports are, of course, open to the public and are published by the commission in their annual reports. In the published report of the commission there is to be shown not only the *physical* value of the property, but also the value of *all* the property of the utility.

It seems to me that when you have adequately and definitely provided for a valuation of both the *physical* property and *all* the property of the utility; for a uniform system of accounting and auditing; for a depreciation, new construction and addition account; for a complete report showing the cost, the gross and net profit, etc., per unit and the price paid by the consumer, you have the factors from which, by mathematical calculation, you can ascertain what is a reasonable rate; at least, that is what we tried to accomplish by the act of 1907. This is wholly lacking in the New York law.

In Wisconsin it is provided that *all* public utilities shall file with the commission schedules showing all their rates, while in New York

it is provided that only railroads and street railroads shall file such schedules. I find no provision in the New York act for gas and electric companies to file any schedules of rates.

In Wisconsin the rendering of any service free, or at a greater or less rate than that named in the published schedule, is punishable by a heavy fine. In New York, departure from schedules, discriminations, rebates, etc., are limited to railways and street railways. There is no such provision covering gas and electric companies; neither is it provided that discrimination shall be ground for complaint against railroads or street railroads.

In Wisconsin it is provided that *all* utilities shall furnish adequate service at reasonable rates. I find no mandatory injunction in the New York law in this regard as to gas and electric companies.

In Wisconsin any mercantile, agricultural or manufacturing society, or any body politic or municipal organization, and as to railroads, street railroads, express and telegraph companies any person, and as to other utilities any twenty-five persons, may make complaint that any rate is unreasonable or unjustly discriminatory, or that any service is inadequate or cannot be obtained. In New York, as to railways and street railways, only persons *aggrieved* may make complaint, and as to gas and electric companies, a municipality or a certain number of *customers* may make complaint. In Wisconsin we do not limit complaint to customers or those who are aggrieved, but, on the contrary, provide that the absence of direct damage to the complainant shall not be sufficient cause to warrant the commission in dismissing the complaint.

The Wisconsin act, unlike New York, provides that the utilities may make complaint to the commission as to any matter affecting it, with like effect as though made by any other person against it.

If the utility does not remedy the thing complained of, here, as well as in New York, the matter is investigated by the commission. Oftentimes an investigation will develop sufficient facts to warrant the commission in believing that no hearing ought to be ordered or it will convince the utility and the matter will be remedied without the necessity of a formal hearing.

If, however, after investigation, the commission is satisfied that a hearing should be had, they may order a hearing upon ten days' notice, and if, upon such hearing, any rate is found to be unjust, unreasonable or discriminatory or preferential, the commission determines and declares, and by order fixes, a reasonable rate to be observed

and followed in the future in lieu of that found to be unjust, unreasonable, discriminatory or preferential. In Wisconsin the commission makes the *exact* rate, while in New York the commission makes a *maximum* rate.

The thing that impresses me regarding the maximum rate provided by the New York law, especially as to gas and electricity, is this. The New York law, not providing for any schedule of rates for gas and electricity, and not being mandatory that gas and electric companies shall furnish an adequate service at reasonable rates, and there being no penalty provided for a discrimination in such rates, I should judge a maximum rate in practice would be found to be rather ineffectual, for the reason that, after the commission has fixed a maximum rate, one customer may be charged the maximum rate, another may be charged any rate not exceeding the maximum rate, and the third may be given free service, and yet there be no violation of the law. Such a thing is impossible under the Wisconsin act. I notice the commissioner from New York said that they expect, in the future, to strengthen their gas and electric law in that State.

Under the act of 1907, if the commission, after investigation finds that any rate or service is unjust, unreasonable, insufficient, discriminatory or preferential, or otherwise in violation of any of the provisions of the act, the commission shall order the utility to pay in to the State treasury, within twenty days, the expense incurred by the commission upon such investigation.

In Wisconsin all orders of the commission go into force and become effective twenty days after they are promulgated, unless the commission shall otherwise order, and all orders of the commission are made *prima facie* lawful and reasonable.

If any utility or any person in interest is dissatisfied with any order of the commission, they may, within ninety days, begin an action in the circuit court for Dane county (the county in which the capitol and the commission are located) against the commission as defendant, to vacate and set aside such order. There has been but one action begun to set aside an order of the commission in the two and one-half years of its existence, and the order of the commission was upheld by the courts.

No injunction shall issue suspending or staying any order of the commission except upon application to the court, notice to the commission and hearing.

The court review, from this point on, is unique in some particu-

lars. The Interstate Commerce Commission found that railroads will not present all their evidence to the commission, but will reserve the presentation thereof in the first instance to the court. The result is that the commission has no chance of passing on all the facts, and the court oftentimes reverses the commission on evidence which was never presented to the commission. We have, I think, effectually guarded against this practice in Wisconsin by providing that if, upon the trial of any action,

evidence shall be introduced by the plaintiff which is found by the court to be different from that offered upon the hearing before the commission or additional thereto, the court, before proceeding to render judgment, unless the parties to such action stipulate in writing to the contrary, shall transmit a copy of such evidence to the commission and shall stay further proceedings in said action for fifteen days from the date of such transmission. Upon the receipt of such evidence, the commission shall consider the same and may alter, modify, amend or rescind its order \* \* \* and shall report its action thereon to said court within ten days from the receipt of such evidence. If the commission shall rescind its order complained of, the action shall be dismissed; if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order complained of, and judgment shall be rendered thereon as though made by the commission in the first instance. If the original order shall not be rescinded or changed by the commission, judgment shall be rendered upon such original order.

The commission is thus placed in a position where it passes on all the testimony offered before the matter comes finally before the court for decision. This will have the effect of making every utility present to the commission, in the first instance, all the testimony it has on the subject.

It is impossible for the State to deal with franchises, stocks, bonds or other similar matters of a corporation that is not a creature of that State. To obviate this difficulty, it is provided by the Wisconsin act of 1907 that

no license, permit or franchise to own, operate, manage or control any plant or equipment for the production, transmission, delivery or furnishing of heat, light, water or power, shall be hereafter granted or transferred except to a corporation duly organized under the laws of the State of Wisconsin.

It is further provided that every license, permit or franchise hereafter granted to any such public utility shall have the effect of an indeterminate permit. The term "indeterminate permit" is defined

as meaning and embracing every grant, directly or indirectly, from the State to any corporation, company, individual, association, or their lessees or trustees or receivers, of the power, right or privilege to own, operate, manage or control any plant or equipment within the State for the production, transmission, delivery or furnishing of heat, light, water or power, either directly or indirectly to or for the public, which shall continue in force until such time as the municipality shall exercise its option to purchase, as provided by the act, or until it shall otherwise terminate according to law.

Every indeterminate permit shall be

subject to the provision that the municipality in which the major part of its property is situated, may purchase the property of such public utility actually used and useful for the convenience of the public at any time, paying therefor just compensation, to be determined by the commission, and according to the terms and conditions fixed by the commission.

Any public utility, being at the time a corporation under the laws of the State of Wisconsin, and operating under an existing license, permit or franchise, upon the filing at any time prior to the expiration of such license, permit or franchise, of a written declaration that it surrenders such license, permit or franchise, shall, by operation of law, receive in lieu thereof, an indeterminate permit, as provided by the act.

So long as a utility furnishes adequate service at reasonable rates, it should have not only the privilege of continuing in business indefinitely, but should also continue in business without competition, and the act provides not only that these permits should be indeterminate, but that no other license, permit or franchise shall be granted in any municipality where there is in operation, under an indeterminate permit, a public utility engaged in a similar service, before first securing from the commission a declaration, after public hearing, that public convenience and necessity require such second public utility.

It is also provided by the act of 1907 that every public utility having conduits, subways, poles or other equipment on or over any street or highway, shall, for reasonable compensation to be determined by the commission, permit the use of the same by any other public utility, whenever public convenience and necessity require such use, and the same will not result in irreparable injury to the owner or other users of said equipment, nor in any substantial detriment to the services to be rendered by such owners and other users.

The act also provides that any public utility may enter into any reasonable arrangement with its customers or consumers or employees for the division or distribution of its surplus profits, or for a sliding scale of charges, or any other financial device that may be practicable and advantageous to the parties interested. But no such arrangement or device shall be lawful until it shall be found by the commission to be reasonable and just and not inconsistent with the provisions of the act, and shall always be under the supervision and regulation of the commission.

Believing that as much power should be left with the municipal councils as possible, it is provided that every municipal council shall have power: (1) To determine the quality and character of each kind of product or service to be furnished or rendered by any public utility within said municipality, and all other terms and conditions not inconsistent with the act upon which such public utility may be permitted to occupy the streets, highways or other public property within such municipality; (2) to require of any public utility such addition or extensions to its physical plant within said municipality as shall be reasonable, or necessary, and to designate the location and nature thereof and the time within which they must be completed; (3) to provide for a penalty for noncompliance with the provisions of any ordinance or resolution adopted pursuant to the foregoing provisions. If, however, the commission, after complaint and hearing, shall find any such contract, ordinance or other determination made in pursuance thereof to be unreasonable, such contract, ordinance or other determination shall be void.

These are some of the principal differences between the Wisconsin and New York acts.

## PUBLIC SERVICE COMMISSIONS

REMARKS UPON THE PAPERS OF SENATOR WILLIAM H. HATTON AND  
MR. THOMAS M. OSBORNE, AT THE JOINT MEETING OF THE AMERICAN  
ECONOMIC ASSOCIATION AND THE AMERICAN POLITICAL SCIENCE  
ASSOCIATION

BY PROF. JOHN H. GRAY

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It is significant that one of the industries now under discussion was the subject of the first monograph published by the American Economic Association, and that the relation of the State to such industries was the topic that received most emphasis at the meeting called to effect the organization of that association.

Less than a decade before the organization of the association, the highest judicial tribunal of the land had recognized the public character of the industries in question, and the consequent right to regulate prices in the public interest. The idea that they are affected with a public interest has been slow to permeate the minds of the promoters and managers of the industries. As a means of enforcing this idea on the monopolists, the public, in violation of all sound theories, has often used so-called competition as a club to bring the companies to time. Long after the courts had declared these monopolies of a public character, and as such subject to public regulation, the public, ignorantly but honestly, attempted to maintain the public rights by limiting the length of franchises. This mistake has so far been a great impediment in the way of a satisfactory solution of our problem. The history of the undertakings under the limited franchise theory has been a close parallel to that in the previous period during the attempts at competing companies. All the world today recognizes the futility of competing companies. Advanced thinkers are not unanimous, but I will venture to predict are moving rapidly toward a unanimity of opinion that limited franchises, like competing companies, are to be justified, if at all, not as a means of regulation or as a method of obtaining directly, adequate service on equitable terms, but as a mere club or weapon with which to force some sense of restraint, justice and

fear into the minds of those recalcitrant managers of public service corporations, upon whose beclouded intellect it has not yet dawned that they are dealing with companies in which the public has very much more at stake than the legal owners have. What we want is not a franchise limited in time, but one so handled and controlled that the *future* unearned increment goes to the public, and, so drawn that the public can resume it at any time without formal forfeiting of it, the moment the company refuses to use it in a manner advantageous to the public. Such franchises are granted in the public, not the private interest; the owners tacitly, if not formally, agree to give service on terms advantageous to the public. So soon as a company ceases to be able or willing to render the public service on these terms, the most that it can properly ask is that it receive compensation or repayment for the money actually contributed by the shareholders and then get out. In order that the companies may receive the benefit of all doubts arising from the ambiguity of their legal rights, we are willing to give them in addition to what they have put in, the present value of their franchises, if on this basis they will fulfill their public duties. But to imply that a company should be given a *future* increment of value on a franchise, is to destroy at one blow the whole theory that the companies are public service companies, and thereby to wipe out all basis of controlling charges. For instance, to allow a street car company to charge a five cent fare today to pay a fair rate of interest on its investment and also on the value of its franchise, and to let it continue to charge five cents when the city and the traffic have increased tenfold on the ground that the franchise at the later date has increased in value till the earnings now are required to pay a fair rate of income on the value of the property and the franchise, is to reason in a circle. For the franchise was at the beginning already capitalized to the full limit that the market recognized any value in it. The value of the franchise of course depends on the rates permitted and actually collected. Social welfare demands in the future rates in all these services which will prevent any increase in the value of the franchise. The method of doing this is to put a value on the tangible property and also on the franchise worked out on some agreed scheme, such as that of Dr. H. C. Adams. Then see that rates in the future are kept down to a point that will give no surplus above a fair rate on this fixed franchise value plus a fair rate on the investment in tangible property.

All in excess of this belongs under the theory of regulation to the

users and should remain in their hand at all times through compulsory reduction of rates.

It is just ten years since I had the honor of reading a paper before one of these associations on the subject of the control of gas companies. In that paper I maintained that the attempts at regulation before the year 1897 had reduced the possible profits of the companies, but had not given adequate service at proper prices, while keeping the economic cost of rendering the service abnormally high. I further predicted, that

no regulating act beneficial to the public can be passed without the consent of the gas companies, nor can it be enforced without their coöperation.

This was meant as a gentle hint to the public to use various kinds of clubs to drive respect for human rights, and some recognition of their own social obligations into the minds of the promoters and managers of public service corporations. The world has moved at a swift pace, and over vast stretches of the then unexplored universe, within the intervening ten years. The more intelligent and notably the younger owners and managers have seen a great light. Such managers really want and are willing now to consent to many things to which they were violently opposed even ten years ago. They have recognized once for all that it is expedient to make formal acknowledgment at least of the public character of the industries. But while making such public profession, they have been fertile in inventing and causing to pass into law in many instances schemes of so-called regulation whose chief object was to prevent actual regulation, and to permit the companies to be run exactly as if the public had no interest in them.

The most powerful single influence tending to make the companies willing to submit to real regulation, has been the agitation for public ownership. The necessary and logical inference from the recognition of the monopolistic character and the public interest of the service, has been the alternative of regulating more effectively private ownership, or of passing to public ownership and management. It is not too much to say that among all the influences exerted against the companies, the agitation for public ownership has been far and away the most powerful. During all this beneficent agitation, the municipalizers have been blissfully ignorant of the fact that in the existing circumstances the evils against which they are striving are quite as sure to crop out in public as in private ownership, unless the public

ownership is subject to some administrative control by a force apart from the city government. The world has indeed moved since a distinguished president of the American Economic Association wrote (Hadley, *Railroad Transportation*, p. 54):

A great many favor limitation of railroad construction. Whether this can ever be effectively carried out is more than questionable. \* \* \* It is not easy to introduce a principle so foreign to the general tendency of our laws; and it may be questioned whether any advantages gained at one point would not be dearly purchased at another.

Let us hope that this will prove the last utterance by a man of scientific standing supporting the view that our public service industries are private affairs, from which the State should withhold its hand. Surely all agree today that there can be no control of public services until the public has the right to prevent unnecessary investment. Certainly, the scientific world in the intervening twenty years has decided that these industries should be monopolies. Upon this decision alone rests the right to regulate. There can be no such thing as a fair return upon investments in this field if the capital honestly invested may be raided by so-called competing companies, at will, thus duplicating the capital by unnecessary investment on which a fair return is then claimed in rate controversies.

It marked an epoch in dealing with public service companies, when the commission on public ownership of the National Civic Federation—a commission representing every phase of belief, affiliation and interest—declared in its final report with but one dissenting voice that the solution of the problem required that each community should have full right and power to take these industries into public ownership and management, at any time when the public interest could not be otherwise maintained. When the constitutional, statutory and financial authority for such action are fully established throughout the land, the opposition to effective control has no leg left on which to stand. The right to purchase by voluntary agreement and to operate, and the right to expropriate on the part of the public, is the right to compel and to control without limit. The power to take life of a company, and also its property at a fair price, is the power to make the company the servant, not the master of the public. Anything short of this under present American conditions falls short of effectiveness. The new Wisconsin law rests on this principle, while the New York law is defective at this point.

May we not justly hope that after a generation of warfare in this matter, the year 1907, has ushered us into a new era of peace in these industries, in the sense that perpetual use of clubs, hammering and warfare, conditions the burdens of which always fall upon the public and which always raise the economic cost of service, may give way to an open, frank and sincere acknowledgment on the part of the owners and promoters of these services, that the services are public in their nature, and that, therefore, they must be adequately controlled by the public. If such prove not to be the case, and that right speedily, the undertakings not only will pass over into public ownership and management, but human progress requires that they should so pass. Let us hope that this changed attitude on the part of the companies may come and may so pacify the people that the public, whether represented at the polls, in the legislature and city council, the executive mansion, or embodied in controlling commissions, may lose some of its instinct for warfare, blood and destruction, and may be willing to coöperate with the private interests involved to give the owner of the private industry a guarantee of an opportunity to earn a fair return, in view of the risk, upon the money actually and necessarily invested in these enterprises.

The most significant attempts at regulation in the last generation have been embodied in the interstate commerce acts (acts which have not yet reached the legal age of 21 years) the railroad commission acts of Massachusetts dating from 1869, the Massachusetts gas and electric light commission acts dating from 1885, and the more recent commission acts relating to gas in New York and the amended railroad commission act of Wisconsin. To these ought to be added the national banking act (older than any of those previously named). Although this act does not relate to what under our law is a public service, the principle involved is so closely assimilated with the principle of the regulation of public utilities as to justify the mention of it in this connection. No one of these attempts at regulation, varied as they have been, has been without great value. Each of them, in its own way, has been of vital importance in educating, not only the consumer and the investor, but also the legislators and the managers of the private companies as well. If these various efforts be viewed, by and large, they will all be recognized as beneficial, and yet they have all fallen far short of the results which must be attained before regulation can be said to have accomplished its object in giving adequate and efficient service at proper rates. This is not to say that the

legislation in regard to these commissions, and the acts of the commissions themselves were not on the whole wise and pointed in the right direction. It is simply a recognition of the fact that human progress is slow, and that a step of one kind may be absolutely necessary as a preliminary before a much wider step in the right direction becomes possible. As well criticise the steps of a two year old child, because they are not equal in length and steadiness to the steps of a vigorous adult man, as to condemn these commissions because they have not accomplished what it was impossible for them to accomplish under the then existing circumstances, although many of those things may prove to be possible of accomplishment under the legislation in regard to public utilities, enacted by the legislatures in Wisconsin and New York in 1907.

Let us summarize very briefly some of the essentials of regulation and then turn our attention to a summary comparison of the public utilities acts of 1907 for Wisconsin and New York, to see their relative significance when measured alongside of these fundamentals. Before making the comparison, it ought to be remarked parenthetically that the principles of control of a privately owned monopoly by a power entirely distinct, not only from the owners and managers, but also from the consumers of the company, apply with equal force to the regulation of a publicly owned monopoly.

First, then, if regulation is to be successful, there must be a uniform system of accounts, records and reports for like service in each of the States. This point involves also actual and frequent public auditing, and a real publicity not only of the auditing, but of the accounts. This implies the acknowledgment to a greater extent than has yet been attained on the part of the owners, that these industries are of so public a nature that the public has the right to know every detail of the organization, financing and management of the undertakings, to as full an extent as it has the right to know in regard to the management of the public schools or the health department of a city. There is, and there can be no effective regulation until the companies are compelled or induced to act in good faith on this principle, and until the controlling organs of the State have money enough and experts enough to put this principle into effective operation. Nor can the idea be made effective in practice until the organ of the State which has supervision of these industries has financial resources enough, and employs a sufficient number of professional accountants and auditors to keep the facts of these industries in an intelligent form before the

city council, the legislature and the consuming public. The accounts and the results of the auditing must not only be public, but they must be published, and actually brought before the voting portion of the public in such a manner as to enable the laymen to understand and compare them for the same company year by year, and also with other companies. Of course, with this degree of publicity the companies must in justice be protected and be permitted to protect themselves from a competition by trade and traffic agreements (subject of course, to approval by public authority and also made public). The rule must work both ways. This brings us to the same point again, namely, the recognition of the public character of the services.

The Massachusetts commissions already referred to, and the inter-state commerce commission have had nominal power to do a large part of the work of control within this field, but unfortunately, at no time have they had the funds, or any expectation of obtaining the funds within a reasonable number of years, to employ a sufficiently large and sufficiently permanent staff, to do this work satisfactorily. What is true of the auditing, accounting and reporting is equally true of the engineering. Real control can never be obtained until the commission has constitutional, statutory, and financial power to organize, maintain and direct a more adequate and effective engineering force in the field of each industry under the control of the commission, than is maintained by the largest and strongest company. When the whole world knows and understands the conditions of the industries through the work of the accountants and the engineers, we have made some real approach toward the regulation of prices, and we have come nearer to the solution of that vexed problem, the taxation of public service corporations. Here it is that we come to the first great technical difference between the public service commissions of New York and of Wisconsin.

Under the legislation of 1907, each of these commissions is nominally given unlimited power of inspection, investigation and of fixing the price of services, within the constitutional requirements regarding due process of law, and just compensation to be determined by judicial authority. Almost every provision that ingenuity can invent seems to have been inserted in both acts to prevent the courts from interfering unduly with the work or orders of the commissioners, and to prevent the companies from using the courts to stay orders of the commission pending a decision on their legality. The relation of the

New York commission to the courts seems to be somewhat more promising than that of Wisconsin.

In the matter of rate regulation we have come face to face with the fact of capitalization, stock watering and franchise values. As I have so often said in the last twenty years, proper consideration of the equities in the case of innocent holders and a due respect for the untold legions of widows and orphans involved in the controversy, as well as every consideration of mere expedience requires that the stock watering of the past, so far as it is reflected in the market values of securities and in the present earnings of companies, and so far as it has been recognized as legal up to the present time, should be accepted on the ground that both the public and the companies have responsibilities for existing conditions. But as previously stated, all *future* increment in the value of the franchise should be prevented by rate reductions or improvement in the service. The Wisconsin law has recognized a principle which heretofore has been but little regarded, although it is emphasized in the new Virginia constitution and the legislation resting upon it, namely, that whatever the specific legal terms or length of existing franchises may be, they have but little actual value in a growing community. A perpetual franchise to operate a street car line over a few miles of line only, in a growing city, has no practical value for the reason that additional franchises become absolutely essential at very frequent intervals to the life of the company. The State, therefore, finds itself almost everywhere with an actual right of amending franchises where no legal right exists, for to refuse a great company the necessary powers to enable it to meet the expanding needs of the community, is virtually to abolish the existing franchise, for this right to refuse amendments can be used by the legislature to obtain from the company a waiver of any rights considered injurious to the public. This enables the State to bring every corporation in all details under the provisions of an act establishing control according to the prevailing idea of justice at the present time.

The Wisconsin law has provided for this, but the control of rates rests on the idea that the owners of the enterprises are entitled to charge rates which will give them a fair return upon the capital actually and necessarily invested to render the service. This implies of course that the capital is not only honestly invested and managed, but is managed with a reasonable degree of skill and efficiency.

The sequel will probably prove that the most important step yet

taken in America in the field of regulating public service corporations is to be found in the provisions of the Wisconsin law compelling the uniform accounting, auditing, and publicity, together with the requirement of the valuation of the physical assets. This provision for valuing the property is not, as the companies seemed to believe before the act was passed, an attempt to squeeze the existing water out of capitalization, or to destroy the value of the existing franchises. It is a mere step, and a necessary one, to determine the value of the existing property and franchises and to obtain the other necessary information without which the right to regulate prices has no basis in equity, but degenerates into the old idea of a club or weapon with which to punish the companies. This provision may properly be regarded as an attempt to seize the *future* (*not the existing*) unearned increment on the franchise for the public. It leaves the existing value of the concern, including the capitalized value of the franchise, in the hands of the present holders. Any proposition short of this really destroys the foundation for regulating prices, and throws us back on the old idea that the companies are really private companies. In fact, to shut off the valuation of the physical assets is to hurl us back into the era of so-called competition, with all of its corruption. But these companies are really public. They are logically monopolies. From these two facts it follows that they ought to have their prices regulated. There can be no just ground in an age of reason and intelligence for permitting private owners to own, capitalize and exploit forever the constantly growing value of these public franchises. It is the height of folly to advocate any rate regulation without a valuation of the physical property. No order affecting charges can be issued in any particular case except on the basis of the value of all property, tangible and intangible. How much better to fix this valuation deliberately and calmly, for all companies, when there is no strife on, rather than in the heat and haste of a bitter controversy in a particular case. It may be in some cases that the franchise furnishes the chief item of property, but the chief claim to compensation by the private owners must rest in the future on their contributions of capital. Until the amount of that is determined, of course, it is utterly impossible to determine the value of the franchise. For the combined value of the two is determined largely by the earnings. This total value cannot be analyzed or separated into its component parts without a valuation of the physical property. The forces acting upon the value of a franchise are dif-

ferent in origin, direction and effect from those acting on the value of the physical property. The one kind of value decreases by time and decay, the other increases with every step in human progress. The only justification for allowing any financial return to the franchise of a public service company rests on the historical fact, that such companies, before the public knew that they were of a public nature, were allowed to charge prices for the service, which paid what was considered a fair return on the capital actually invested and in addition furnished the basis for a high value of the franchise. Then the companies were permitted to issue capitalization against this value, and even to make false declaration as to the amount of such earnings, and thereby base excessive amounts of their watered capitalization on this surplus, and then palm such securities off on the innocent investor, the widow and the orphan, for whom protection is now claimed. Every element of value, tangible and intangible, ought to be taken into consideration in fixing the present value, both for taxation and the fixing of rates; but as already indicated, the basis and starting point of all valuation for these purposes is the valuation of the physical property, without that no scientific progress can be made.

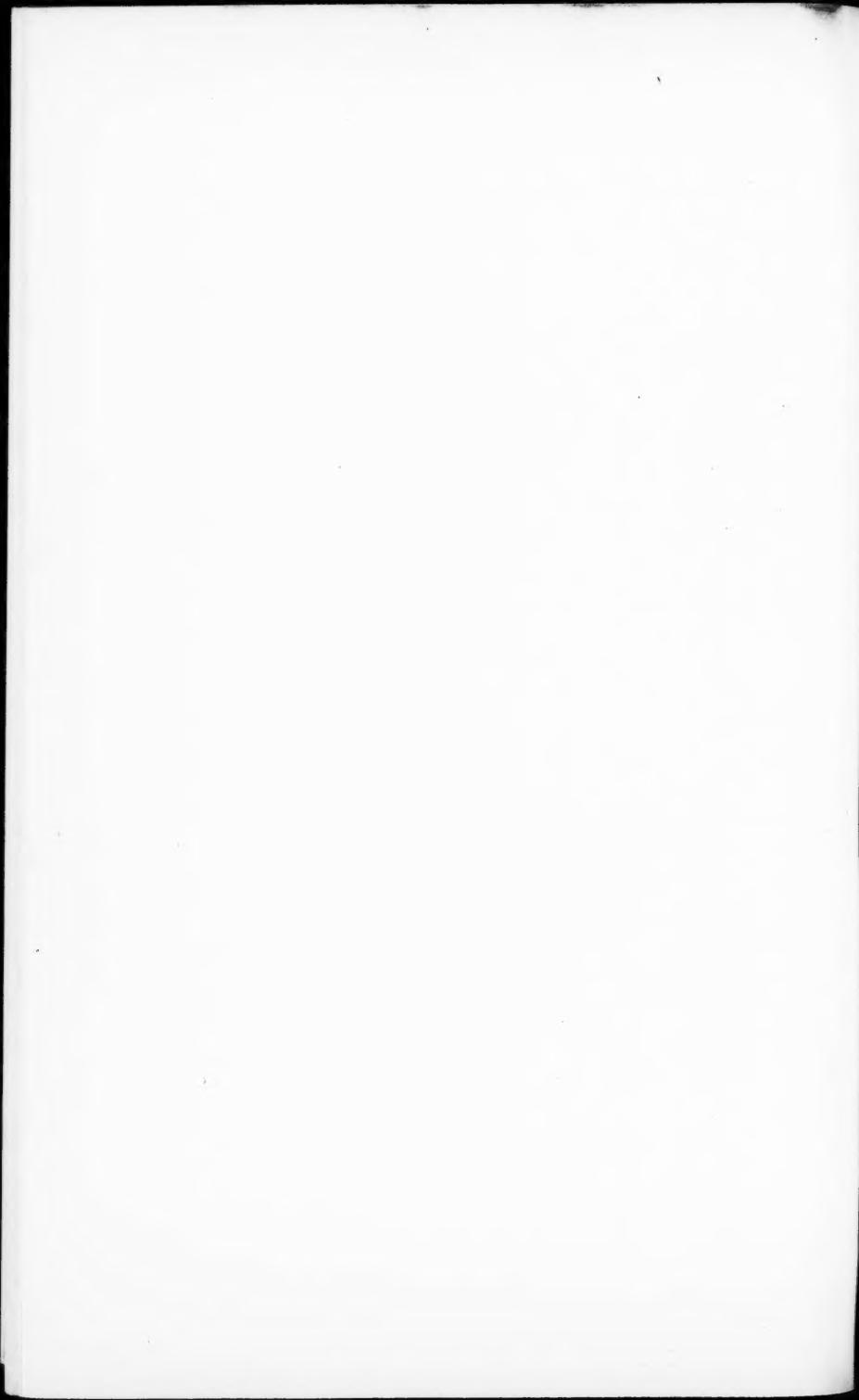
In the two fundamental requisites of effective regulation, uniform accounting, together with public auditing, and the valuation of the tangible property, the Wisconsin law seems immensely superior to that of New York. I should say that the most hopeful feature of the New York law has nothing to do with the formal powers conferred upon the commission, but relates rather to the fact that as nearly as may be under a constitutional government, the commission has placed at its service unlimited funds with formal authority of so broad and autonomous a nature conferred upon the commission, that it may if it pleases, establish uniform accounting, auditing and reporting; organize and maintain whatever staff of engineers, accountants, librarians, statisticians and other experts seems necessary, and may if it chooses, beyond doubt, establish a physical valuation of the plants. Until the law is changed, that commission seems much less likely to be hampered from lack of funds, than the Wisconsin commission. The practical danger in New York is that the commission will be swamped with what seem pressing demands upon its time and energies, and will involve itself in an untenable position in an attempt to prevent stock watering by passing upon petitions for the issue of stocks and bonds. Petitions of this sort may easily be made to

occupy the major portion of the time of the commission to the exclusion of more important matters. The practical way to prevent stock watering, is to value the physical property of the company and fix the value of the franchise at the same time. This will check stock watering by making it utterly useless.

All previous attempts at regulation, state and federal, have been shipwrecked after accomplishing relatively little, by the inadequacy of the appropriation placed at the disposal of the controlling organ. Let us hope that the reorganized interstate commerce commission of 1906, and the recently established public utilities commissions of New York and Wisconsin will be able, even under the pressure of an impetuous and somewhat uneducated public opinion, to accomplish such a degree of success as will, once and for all, convince the public that all human government, in as complex affairs as these commissions are required to deal with, is a scientific matter, requiring expert knowledge, both of a higher degree and also of a much larger mass than has heretofore been recognized, and that these can be obtained only by large expenditures of money, and, expenditures too, on a very much larger scale than the public has heretofore deemed necessary.

In this respect the New York commissions (and notably that of the first district) are much more interesting experiments than that in Wisconsin. The problems in the first district of New York are unfortunately, more dynamic at present and more consciously pressing for solution. Fortunately, the people begin to realize that vast sums of money are required for their solution. It is an inspiring sight therefore, to see the resources of that district placed so much more largely than in any instance heretofore in America at the disposition of the public service commission. Every well wisher of America, and every man who has come to realize that unregulated private monopoly in important public service is oppressive and unendurable ought to rejoice at the experiments now going on both in Wisconsin and New York, and to recognize them as probably the most important experiments in human government yet undertaken in America. Not least of all should he rejoice in the high character of the commissioners, and in the fact that, coupled with large legal powers, these commissions, especially in New York (first district), have adequate funds placed at their service to enable them to carry on their work. Let us all pray that public sentiment may so far be held in check as to give these commissions substantially on the present basis, a considerable number of years to wrestle with this problem before their powers are

greatly curtailed, or possibly destroyed by further and hostile legislation. Either law is good enough to bring about marvelous progress if only it can be saved from change, or the serious fear of change, until it has a chance to show what can be done under it.

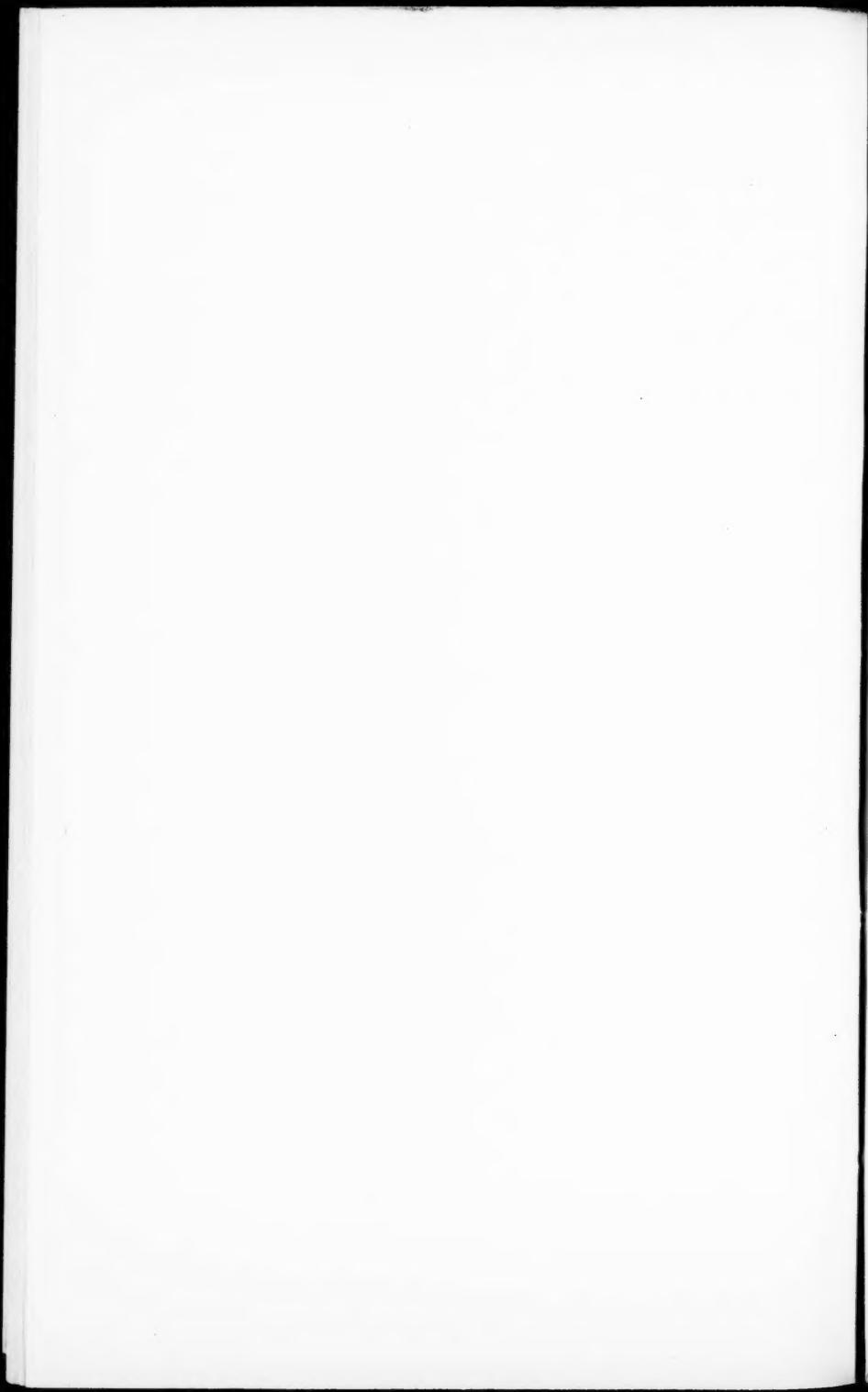


## INDEX

- Administration of punitive justice..... 224-285  
 Allin, C. D., An intercolonial preferential experiment..... 57
- Babb, Jas. E., Problems of trial by jury..... 240  
 Barrett, John, Latin America of today and its relations with the United States..... 34  
 Barrows, S. J., Legal obstacles to the reform of prisoners..... 260  
 Bingham, Hiram, The possibilities of South American history as a field of research..... 46
- City government, the Des Moines plan of, by Benjamin F. Shambaugh..... 189  
 Colonial government ..... 48-57  
 Comparative legislation, Report of committee on, by J. W. Jenks..... 138  
     view of criminal procedure, a note. By Rudolf Leonhard..... 285  
 Constitution..... 3  
 Criminal procedure, a comparative view of, by Rudolf Leonhard..... 285  
     proposed reforms in, by Horace E. Deemer..... 246
- Deemer, Horace E., Proposed reforms in criminal procedure..... 246  
 Democracy, The newer institutional forms of..... 141-198  
 Des Moines plan of city government, by Benjamin F. Shambaugh..... 189  
 Dudgeon, M. S., The revision of statute law..... 132
- Ekern, Herman L., The revision of statute law..... 135
- French colonial system, Some merits and defects of the, by William B. Munro 48  
 Freund, Ernst, The problem of intelligent legislation..... 69
- Garner, J. W., Primary vs. representative government..... 164  
 Gilmore, E. A., The improvement and revision of statute law..... 128  
 Gray, John H., Public service commissions. Remarks upon the papers of Senator Hatton and Mr. Osborne..... 324
- Hatton, Wm. H., The public service commission law of Wisconsin..... 305  
 Haynes, George H., Massachusetts public opinion bills..... 152  
 Hoyt, Frank M., Intelligent legislation..... 103  
 Hudnall, George B., The public service commission law of Wisconsin..... 316
- Improvement and revision of statute law, by E. A. Gilmore..... 128  
 Influence of the primary election upon party organization, by Jesse Macy..... 175  
 Inherent and acquired difficulties in the administration of punitive justice, by Roscoe A. Pound..... 222  
 Initiative and referendum in Oregon, by George A. Thacher..... 198  
     results of, in Oregon, by W. S. U'Ren..... 193  
 Intelligent legislation, by Frank M. Hoyt..... 104  
 Intercolonial preferential experiment, by C. D. Allin..... 57
- Jenks, J. W., Report of committee on comparative legislation..... 138  
 Jury, Problems of trial by, James E. Babb..... 240
- Latin American of today and its relations with the United States. By John Barrett..... 34  
     republics..... 28-46

Law, The making and revision of.....	69-138
Legal Obstacles to the reform of prisoners, by S. J. Barrows.....	260
repression of political corruption, by Frank E. McGovern.....	266
Legislation, Recent institutional, by J. Allen Smith.....	141
Legislation, Intelligent, by Frank M. Hoyt.....	103
the problem of intelligent, by Ernst Freund.....	69
Legislative conditions, remedies for, by Charles McCarthy.....	80
Leonhard, Rudolf, A comparative view of criminal procedure.....	285
Lester, Clarence B., Discussion of Dr. McCarthy's paper.....	103
List of members.....	7
 McCarthy, Charles, Remedies for legislative conditions.....	80
McCormick, Robert H., Jr., Problems of criminal judicature in Chicago and how they have been met by the municipal court.....	277
McGovern, Frank E., The legal repression of political corruption.....	266
Macy, Jesse, The influence of primary election upon party organization.....	175
Making and revision of law.....	69-138
Massachusetts public opinion bills, by George H. Haynes.....	152
Merriam, Charles E., Some disputed points in primary elections.....	179
Municipal court, problems of criminal judicature in Chicago and how they have been met by the, by Robert H. McCormick, Jr.....	277
Munro, William B., Some merits and defects of the French colonial system .....	48
 New York, public service commissions law of, by Thos. M. Osborne.....	287
Newer institutional forms of democracy.....	141-198
 Officers of the association.....	5
Oregon, The initiative and referendum in, by George A. Thacher.....	198
Osborne, Thos. M., The public service commissions law of New York.....	287
 Political corruption, The legal repression of, by Frank E. McGovern .....	266
Possibilities of South American history and politics as a field of research, by Hiram Bingham.....	46
Pound, Roscoe A., Inherent and acquired difficulties in the administration of punitive justice .....	222
Presidential address.....	27
Primary elections, Some disputed points in, by Charles E. Merriam .....	179
vs. representative government, by J. W. Garner.....	164
Prisoners, legal obstacles to the reform of, by S. J. Barrows.....	260
Problem of intelligent legislation, by Ernst Freund.....	69
Problems of criminal judicature in Chicago and how they have been met by the municipal court, by Robert H. McCormick, Jr .....	277
of statutory revision, by John B. Sanborn.....	113
Proposed reforms in criminal procedure, by Horace E. Deemer.....	246
Public opinion bills, Massachusetts, by George H. Haynes.....	152
service commissions law of New York, by Thos. M. Osborne.....	287
Wisconsin, by William H. Hatton.....	305
by George B. Hudnall.....	316
service commissions .....	287-324
Remarks upon the papers of Senator Hatton and Mr. Osborne, by John H. Gray.....	324
Punitive justice, The administration of .....	224-285
justice, Inherent and acquired difficulties in the administration of, by Roscoe A. Pound.....	222
 Recent institutional legislation, by J. Allen Smith.....	141
Remedies for legislative conditions, by Charles McCarthy.....	80
Report of committee on comparative legislation, by J. W. Jenks .....	138
of the secretary and treasurer.....	21

Representative government, Primary vs., by J. W. Garner.....	164
Results of the initiative and referendum in Oregon, by W. S. U'Ren.....	193
Revision of statute law, by M. S. Dudgeon.....	132
by Herman L. Ekern.....	135
Rowe, L. S., Some fundamental misconceptions concerning South America.....	28
Sanborn, John B., The problem of statutory revision.....	113
Shambaugh, Benjamin F., The Des Moines plan of city government.....	189
Smith, J. Allen, Recent institutional legislation.....	141
Some disputed points in primary elections, by Charles E. Merriam.....	179
fundamental misconceptions concerning South America. By Prof. L. S. Rowe.....	28
merits and defects of the French colonial system, by William B. Munro.....	48
South America, Some fundamental misconceptions concerning, by Prof. L. S. Rowe.....	28
American history and politics, possibilities of, as a field of research, by Hiram Bingham.....	46
Statute Law, The improvement and revision of, by E. A. Gilmore.....	128
the revision of, by M. S. Dudgeon.....	132
Herman L. Ekern.....	135
Statutory Revision, The problem of, by John B. Sanborn.....	113
Thacher, George A., The initiative and referendum in Oregon.....	198
United States, and its relations with Latin America of today, by John Barrett ..	34
U'Ren, W. S., Results of the initiative and referendum in Oregon.....	193
Wisconsin, The public service commission law of, by William H. Hatton....	305
by George B. Hudnall.....	316



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## PROCEEDINGS OF THE ASSOCIATION Vol. I, 1904

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Colonial Autonomy.....	Paul S. Reinsch
State Boards of Health.....	Charles V. Chapin
State Supervision of Local Finance .....	John A. Fairlie
The Reorganization of Local Government in Cuba.....	Leo S. Rowe
Governmental Interference with Industrial Combinations.....	E. B. Whitney
The Regulation of Railway Rates.....	Martin A. Knapp
Tendencies in the Law of Taxation of Railways.....	H. C. Adams

## PROCEEDINGS OF THE ASSOCIATION Vol. II, 1905

The Growth of Executive Discretion: Presidential Address.....	Frank J. Goodnow
The Use of Neutral Waters by Belligerents.....	John Holladay Latané
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The Comparative Results, in the Advancement of Private International Law, of the Montevideo Congress of 1888-1889 and the Hague Conferences of 1893, 1894, 1900, and 1904.....	Simeon E. Baldwin
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Municipal Ownership.....	Winthrop M. Daniels
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The Realities of Negro Suffrage.....	Albert Bushnell Hart
Corrupt Practices and Election Laws in the United States.....	George L. Fox
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The Scope of Political Science.....	Henry Jones Ford
What do Students know about American Government before taking College Courses in Political Science?.....	William A. Schaper
Report of the Meeting of the Section on Comparative Legislation	

## PROCEEDINGS OF THE ASSOCIATION Vol. III, 1906

A Revision of the Geneva Convention.....	Charles S. Sperry
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Some Observations Concerning the Principles which should Govern the Organization and Regulation of Life Insurance Companies.....	W. C. Johnson
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Helping to Govern India.....	Charles Johnson
Spanish Administration of Philippine Commerce.....	Chester Lloyd Jones
Some Effects of Outlying Dependencies upon the People of the United States	
The Need of a Scientific Study of Colonial Problems.....	Henry C. Morris
The Question of Terminology.....	Allyne Ireland
Popular Interest in Insular Possessions .....	Alpheus H. Snow
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